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No. 08-687

Supreme Court, U.S.
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In The
Supreme Court of the United States

RUSSELL WAYNE HUNT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED FOR REVIEW

Whether the current standard of review for substantive reasonableness permits the reversal of an otherwise reasonable sentence based exclusively upon the remote possibility that the district court may have considered an "impermissible factor" namely, the defendant's possible "innocence?"

TABLE OF CONTENTS

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 4

Reason for Granting Writ 18

Conclusion 30

TABLE OF AUTHORITIES

Page

Cases:

Gall v. United States,
128 S. Ct. 586 (2007) 18, 20-23, 26-29

Kimbrough v. United States,
128 S. Ct. 558 (2007) 18, 21-22

United States v. Bolds,
511 F.3d 568 (6th Cir. 2007) 24

United States v. Brown,
501 F.3d 722 (6th Cir. 2007) 18-19, 24

United States v. Carter,
510 F.3d 593 (6th Cir. 2007) 25

United States v. Conatser,
514 F.3d 508 (6th Cir. 2008) 25

United States v. Grossman,
513 F.3d 592 (6th Cir. 2008) 22-24

United States v. Hollman,
2008 WL 111028 (6th Cir. Jan. 9, 2008) . 24

United States v. Hunt,
521 F.3d 636 (6th Cir. 2008) 1

United States v. Lalonde,
509 F.3d 750 (6th Cir. 2007) 25

United States v. Madden,
515 F.3d 601 (6th Cir. 2008) 25

United States v. Phinazee,
515 F.3d 511 (6th Cir. 2008) 25

United States v. Sedore,
512 F.3d 819 (6th Cir. 2008) 25

United States v. Smith,
510 F.3d 603 (6th Cir. 2007) 25

United States v. Tate,
516 F.3d 459 (6th Cir. 2008) 25

United States v. Vowell,
516 F.3d 503 (6th Cir. 2008) 25

United States v. Webb,
403 F.3d 373 (6th Cir. 2005) 18, 24

Statutes:

18 U.S.C. § 1254 1

18 U.S.C. § 3553 ..... 2, 20-22, 26, 28-29

18 U.S.C. § 3661 ..... 4, 27

Guidelines

U.S.S.G. § 3B1.2 28

U.S.S.G. § 5K2.10 28

U.S.S.G. § 5K2.11 28

U.S.S.G. § 5K2.12 28

U.S.S.G. § 5K2.13 28

Petitioner Dr. Russell Wayne Hunt respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *United States v. Hunt*, 521 F.3d 636 (6th Cir. 2008). (App. B & C). The opinion of the district court in *United States v. Hunt*, No. 3:04-00135-3 (M.D. Tenn. 2006) is not reported. (App. D).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on April 11, 2008. The Court of Appeals denied the timely petition for rehearing and for rehearing *en banc* on August 22, 2008. (App. A). This petition for writ of certiorari was filed within 90 days of the entry of the judgment of the Court of Appeals for the Sixth Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553 provides, in pertinent part, as follows:

> [t]he court, in determining the particular sentence to be imposed, shall consider:
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed--
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical

care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code ...

...

(5) a pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code . . .; and

(B) that, except as provided in section

3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and,

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3661 provides as follows:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

STATEMENT OF THE CASE

In 2005, Petitioner Russell Wayne Hunt, M.D., (hereinafter "Petitioner" or "Dr. Hunt") was tried and convicted of a series of heath care fraud offenses. Dr. Hunt testified, advanced other proof and mounted a highly substantive defense to the action. The jury

was instructed on deliberate ignorance, and Dr. Hunt was convicted on all counts. Given the overwhelming mitigating circumstances, the district court sentenced Dr. Hunt to a 5 year term of probation along with other financial penalties.

The crime of conviction was a non-violent, fraud offense. It involved the use of state-of-the-art, non-invasive medical equipment to test voluntary, consenting participants for a "silent killer" - carotid artery disease which leads to stroke. Mark Noble recruited many doctors, including Dr. Hunt, to screen patients for the carotid artery ultrasound test offered by Noble's companies.

Dr. Hunt met Noble in 1999 when he was starting his medical practice and was looking for ways to market himself to new patients. Dr. Hunt's specialty was preventive medicine, a practice philosophy that emphasizes the prevention of disease before it happens. Noble came to Dr. Hunt's offices and talked to him and his wife about his business and the merits of carotid artery ultrasound testing.

Subsequently, Dr. Hunt attended health fairs and interacted with other doctors who were screening patients for the carotid artery ultrasound test offered by Noble's companies. Dr. Hunt was impressed that other doctors were participating in Noble's business

and felt that other doctors' participation validated Noble's procedures and manner of doing business.

Dr. Hunt began attending the health fairs with Noble's company and evaluating whether patients should have carotid artery ultrasound testing. He screened patients using the checklist authored by a prominent vascular surgeon at Meharry Dr. Hunt did not order the test for everyone.

By late 2001, Dr. Hunt told Noble that because his practice had grown substantially, he could no longer attend the health fairs and other events. Noble encouraged him to hire a nurse practitioner to screen patients on his behalf.

Dr. Hunt then gave Noble a list of approved nurse practitioners and told Noble that it was okay to hire a nurse practitioner off the list and use one of them on his behalf. Thereafter, Noble assured both Dr. Hunt and his wife that he had a nurse practitioner at the events, that they were seeing the patients, and that other doctors also continued to authorize the tests. Dr. Hunt believed that a nurse practitioner was present at the test sites.

Unfortunately, Noble did not hire a nurse practitioner to screen patients, and Dr. Hunt did not confirm that the procedure was followed. Noble took a shortcut and hired a nurse. As a result, Dr. Hunt

signed off on and ordered several carotid artery ultrasound tests for patients who meet the checklist requirements but were not, in fact, seen by him or a nurse practitioner.

Consequently, Medicare paid Noble's companies a total of $113,247.85, and Blue Cross/Blue Shield paid Noble's companies a total of $30,235.05. Dr. Hunt was not involved in Noble's business practices and had no input in his billing. Dr. Hunt was not a medicare provider. He never billed Medicare for services and thus, was paid nothing by Medicare. On the other hand, BC/BS paid Dr. Hunt a total of $7,678.88 over the course of two (2) years – representing less than 2% of the income from his medical practice. If asked for reimbursement, Dr. Hunt would have gladly refunded this revenue.

Even government witnesses and coconspirators confirmed that there were no red flags to alert Dr. Hunt to the pitfalls of Noble's scheme. Rather, Noble presented himself with an air of legitimacy.

This fraud case was highly unusual and distinguishable from many others in that a legitimate test was performed on real patients who wanted the test. There is no allegation that the test was not performed. Likewise, there is no suggestion

that the patients were coerced, intimidated or tricked into having the test. Rather, this was an excellent preventive test that patients elected to undergo. Although BC/BS and Medicare do not pay for patients' voluntary testing, the test detected real problems that, in turn, required real medical treatment. It served a measurable benefit, and in some instances, saved lives.

At his sentencing on September 1, 2006, the district court correctly calculated and considered the Sentencing Guidelines (a total offense level calculation of 18 with a Criminal History Category of I for a range of 27 to 33 months). The district court also properly considered the sentencing filings of the parties, the many insightful character letters written by friends, family, business associates and patients of Dr. Hunt, the proof offered by the parties at trial and sentencing, Dr. Hunt's allocution and the arguments of counsel.

The case agent's sentencing testimony established: (1) the civil and administrative remedies for collection were available to the government, but were deliberately abandoned in favor of criminal prosecution; and, (2) much of the loss was a direct result of Medicare authorizing Noble's creation of a second company (Heath Tech Screening) while his

first company (Vascular Check) was under government investigation for fraud and continuing to issue suspect payments to Noble. Additionally, the case agent's testimony established that other clearly culpable owners of Noble's companies (Dr. Sabourin and Dr. McCoy) were inexplicably not prosecuted. Likewise, a co-conspirator, Pat Reed, testified that Noble misled many participating doctors (including Dr. Hunt) about the requirements for authorizing the carotid artery ultrasound test and misled them about the way to bill for the service.

After correctly calculating the guidelines and balancing all of the 18 U.S.C. §3553(a) sentencing factors, the district court determined that the appropriate sentence was five (5) years probation, a $6,000.00 fine to be paid within 60 days, $151,161.78 in joint and several restitution ($50,000.00 of which was to be paid within 60 days), a $1,200 mandatory special assessment, and the cost of supervision ($287.73 per month for 5 years). (App. D & E). The district court deliberately and methodically arrived at the sentence based upon proper, balanced and due consideration of all of the permissible and pertinent sentencing factors.

The district court made thirteen (13) pages of detailed findings on the record to support and amply

justify the mitigated sentence below the advisory guideline range. (App. E4-E17).

When balancing the §3553(a) factors, the district court began by stating:

> This is one of the more difficult, complicated sentencings that the court has had to do.
>
> We must bear in mind that under the present sentencing situation, the court has to take account of the sentencing guidelines but also in taking account of that impose a sentence that is sufficient but not greater than necessary to comply with the purposes set forth in the statute.

(App. E4).

The district court diligently considered each of the §3553(a) factors, finding:

- justice might have been better served had Dr. Hunt been given a civil out;
- Dr. Hunt made very little money from Noble's scheme ($7,500 over 2-3 years; a microscopic fraction of his overall business);
- Dr. Hunt had a preventive medicine practice and that he believed in the test;

- "Dr. Hunt was -- first of all, was hoodwinked by Mr. Noble, second of all was naive, third of all was trusting, fourth of all was unknowledgeable about the business part of the practice like many, many doctors and other healthcare professionals are, but most of all was motivated to do this because he thought it was a good test, and he thought that it would detect some things that would be helpful for people to detect;"
- it was a harmless, noninvasive test;
- patients wanted the test;
- this was not a case of billing for a test that was not performed;
- more culpable and knowledgeable co-owners (Sabourin & McCoy) were not prosecuted;
- other doctors (Moore, Adams, Bartee) situated similarly to Dr. Hunt and other people with more

knowledge than Dr. Hunt (James Haynes & Diane Haynes) "have not paid any price for their involvement;"

- that the rules for coding and billing are extremely complicated and even supposedly knowledgeable government trial witnesses could not answer some coding and billing questions (citing to testimony of Angela Eddings, Diane Ward and Julie Davis);
- that Dr. Hunt was not a Medicare provider (so he was never provided their rules), and he did not bill Medicare;
- that Dr. Hunt was mislead by Noble and McCoy, mitigating his fraudulent intent;
- that Dr. Hunt did attend some health fairs in the beginning and screened patients himself, and later, he believed a nurse practitioner was screening them under his license;

- that, in an interview with investigators, Dr. Hunt told the government that he was authorizing tests after they had been performed "which has some impact upon whether he had a fraudulent intent, at least in the court's mind;"
- that he was a hard-working, self-made, well-respected doctor who hailed from humble beginnings;
- that his character letters speak so highly of him as a person and a doctor; and,
- that "it's clear to the court that Dr. Hunt is someone important to his patients, and he has a valuable medical practice and something valuable to add to the community of medical care that's offered out there. He's offering some alternative kinds of treatments which in many instances people were at their last resort or they were facing some kind of serious surgery and

> they were able to get treatment from Dr. Hunt that made them better and avoided surgery and perhaps avoided dying prematurely. To the extent that this sentence will perhaps assist in returning him to the practice of medicine at some point, the court feels there's value to that."

(App. E4-E17, E20-E22).

The district court went on to say:

> In terms of the needs that the sentence must meet, the sentence must reflect the seriousness of the offense. It must promote respect for the law. It must provide a just punishment. It must protect the public from further crimes, and it must provide the defendant with needed educational or vocational training or medical care. None of that comes in to this particular case.
>
> In terms of the sentence to be imposed, the court is very affected by the fact that Dr. Hunt cannot practice medicine; we don't know for how long, maybe the rest of his life, certainly for any period of time he's going to be under supervision by this court.
>
> That is a huge, huge punishment

that is already being extracted against Dr. Hunt that Mark Noble doesn't have, Pat Reed doesn't have, certainly none of these other doctors involved here who didn't get prosecuted don't have. That is a huge price that Dr. Hunt is already paying for what he did.

And that is very -- an important consideration for this court in terms of what kind of a sentence needs to be levied to have an impact in terms of a just punishment, in terms of promoting respect for the law, and so forth.

Losing his license alone promotes all of that without any further punishment whatsoever.

The court under the present system takes into account the sentencing guideline. The sentencing guideline in this case in the context of all the factors that I have said is not an appropriate sentence for Dr. Hunt.

And the court believes strongly in the right to go to trial, the right to try to convince a jury that you did not have a fraudulent intent. You didn't succeed. But in this judge's view, you are not to be penalized for that. That is your right.

And again, the court feels strongly that if it were not for the nature of Mr. Noble and his enterprise, if this were some much more low key

> scheme -- I think that Mr. Noble's brazen scheme infected the trial of this case with the jury.
>
> At any rate, my sentence for Dr. Hunt is going to be five years of probation.

(App. E15-E17).

The government appealed the sentence, arguing that it was substantively unreasonable. The government conceded that the sentence was procedurally reasonable.

In a split decision, the Sixth Circuit reversed the district court's imposition of sentence and remanded for resentencing. (App. B1-B3, B31-B48). Although the Panel of the Sixth Circuit loosely acknowledged the many pages (13 total) of undisputedly correct findings justifying the sentence imposed, it nonetheless vacated the sentence and remanded for resentencing based upon its erroneous factual interpretation of a single consideration that "may" have factored into the district court's decision. The Panel's majority opinion states:

> . . . although the question is close because of the limited abuse-of-discretion review prescribed by *Gall v. United States*, --- U.S. ----, 128 S.Ct. 586, 597 (2007), the Government is correct that Hunt's sentence is

> substantively unreasonable. A district court imposes a substantively unreasonable sentence, and thereby abuses its discretion, when it bases the sentence on impermissible factors, *see United States v. Brown*, 501 F.3d 722, 724 (6th Cir .2007), and it appears that the district court may have done that in relying on indications that Hunt was not guilty as found by the jury.

(App. B31-B32)(emphasis added). The Panel went on to infer that, as justification for the sentence, the district court relied upon a clearly erroneous and "impermissible" fact, namely his "innocence." *Id.*

The dissenting opinion correctly points out that: (1) the district court did not rely upon a finding of "innocence" but rather considered Dr. Hunt's relative culpability in comparison with other co-conspirators; and, (2) the Sixth Circuit's "majority [decision] is in conflict with the Supreme Court's recent decision in *Gall v. United States*, --- U.S. ----, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)." (App. B36-38).

REASON FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioner Hunt submits that the Court of Appeals' decision involves a question of exceptional public importance, namely whether the Sixth Circuit majority reversed the sentence based on a standard of review for determining substantive reasonableness that manifestly conflicts with the letter and spirit of this Court's decision in *Gall v. United States*, 128 S. Ct. 586 (2007), *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

The Sixth Circuit Panel was split on the standard for review. The dissenting opinion makes it abundantly clear that the published majority misapprehended the teachings of *Gall* and created an invalid standard of review for substantive reasonableness. (App. B36-B48)

The majority opinion of the Sixth Circuit reversed the sentence imposed by the district court in this case because it was purportedly based on an "impermissible factor" -- namely, the district court's reliance on Dr. Hunt's possible "innocence." (App. B31-B36) Because the Sixth Circuit Panel majority's conclusion was based on a standard of review for substantive reasonableness that is no longer compatible with Supreme Court precedent and otherwise finds no basis in the controlling statute, writ of certiorari should be granted to clarify the governing standard of review for substantive reasonableness.

The Panel majority applied the standard of review for substantive reasonableness set forth in *United States v. Brown*, 501 F.3d 722, 724 (6th Cir. 2007), which can be traced back to *United States v. Webb*, 403 F.3d 373, 384 (6th Cir. 2005), and which holds that "a district court imposes a substantively unreasonable sentence, and thereby abuses its discretion, when it bases the sentence on impermissible factors." (B31-B32) Although this standard for substantive reasonableness emerged in the Sixth Circuit in the wake of *Booker*, to the extent that it refers to "impermissible factors," it is clearly incompatible with this Court's recent elaboration of

the proper standard of review for substantive reasonableness.

In *Gall v. United States*, 128 S. Ct. 586 (2007), this Court elaborated on the proper standard for appellate review of a sentence for substantive reasonableness. Under an abuse-of-discretion standard, the court of appeals "will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.* More specifically, if the sentence is outside the Guidelines range, the court of appeals "may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* Finally, "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.*

The controlling standard set forth in *Gall* makes no mention of "impermissible" or "improper" factors. Indeed, the Court rejected the Eighth Circuit's determination that the district judge's consideration of the defendant's immaturity and studies regarding the brain development of young people was an "improper factor." *Id.* at 601.

Contrary to the Eighth Circuit's view, this Court ruled that the district court in *Gall* acted reasonably in considering this factor (as well as other disputed factors) in the course of its analysis under § 3553(a)(1) and (2). *Id.* at 601-02. Summarizing the degree of deference owed to the district court in considering the § 3553(a) factors to fashion a just sentence that satisfies the purposes of sentencing under § 3553(a)(2), the Court emphasized that "it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable." *Id.* at 602.

In *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Court ruled that, under the abuse-of-discretion standard for substantive review elaborated in *Gall*, disagreement with the disparity created by the crack guidelines is not an "impermissible factor," even in the ordinary case. *Id.* at 576. As a result, a district court does not abuse its discretion if, "based on a reasoned appraisal," it disagrees with a guideline, even as a matter of policy – if, for example, a guideline is not based on empirical evidence or national experience. *Id.* at 575. In reaching its conclusion, this Court "declined to read any implicit directive [to the Commission or the courts] into [] congressional silence" regarding appropriate

sentences within the brackets set by the statutory minimum and maximum sentences. *Id.* at 571.

Thus, in *Gall* and *Kimbrough,* this Court squarely rejected the practice of some courts of appeals in the wake of *Booker* to label as categorically "impermissible" or "improper" those factors that fall within the district court's charge under § 3553(a). A court of appeals' designation of factors as "impermissible," although they are not prohibited by statute or the Constitution, is just the sort of arbitrary appellate intervention in the district court's sentencing function that the Supreme Court has taken pains to correct.

In contrast, it would be "impermissible" for the district court to sentence above a statutory maximum or below a statutory minimum, or to increase a sentence expressly based on race.

In creating a new and improper standard of review for substantive reasonableness, the Sixth Circuit majority disregarded other post-*Gall* Sixth Circuit cases that correctly discussed substantive review without referring to "impermissible factors."

For example, in *United States v. Grossman,* 513 F.3d 592 (6th Cir. 2008), a previous panel of the Sixth Circuit recognized the now-controlling standard

of review for substantive reasonableness when it affirmed a substantial downward variance based on individualized considerations in a child pornography case. There, a majority of the panel discussed at length the standard set forth in *Gall*, and in particular, the duty of an appellate court: "'It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.'" *Id.* at 596 (quoting *Gall* at 597). As stated by the *Grossman* majority, "[p]erhaps most importantly, *Gall* shows that the sentencing process involves an exercise in judgment, not a mathematical proof." *Id.* The *Grossman* majority went on to explain that "due deference to the sentencing judge's on-the-scene assessment of the competing considerations" means "not just abuse-of-discretion review to the reasonableness of a sentence but abuse-of-discretion review to the district court's determination that there is a legitimate correlation between the size of the variance and the reasons given for it." *Id.* (quoting *Gall* at 597-98). The majority concluded that "measured . . . above all by *Gall*'s deference to district court judges at sentencing, the district court did not commit reversible error," despite its own assessment that the defendant's

offense was "thoroughly disgusting and antisocial in every way, shape and fashion." *Id.* The majority also viewed the fact that the low end of the advisory guideline range fell above the statutory maximum as "initial evidence" that the Guidelines overstate the seriousness of the offense, suggesting that a district court's reliance on the disconnect between the guideline range and Congress's intent regarding the range of punishment would be entirely reasonable. *Id.* Notably, neither the majority nor the dissenting judge in *Grossman* cited *Brown* or *Webb* or any other pre-*Gall* Sixth Circuit case for the Circuit's standard for substantive review. Moreover, the concept of an "impermissible" or improper" factor was not mentioned.

Grossman is not the only post-*Gall* Sixth Circuit case that does not mention "impermissible factors" as a component of review for substantive reasonableness. *See, e.g., United States v. Bolds*, 511 F.3d 568, 581 (6th Cir. 2007)(citing and quoting *Gall* for the proper standard, without referring to "impermissible" factors); *see also, e.g., United States v. Hollman*, 2008 WL 111028 (6th Cir. Jan. 9, 2008) (quoting *Gall* for standard). In addition, it appears that none of the post-*Gall* cases that refer to the pre-*Gall* concept of a substantively "impermissible factor"

attempt to explain its continued viability in light of *Gall*. Even more critical, no case actually relies upon this unexplained standard, as the Panel did here, to *reverse* a sentence as substantively unreasonable. Rather, courts have generally cited the concept of substantively "impermissible" factors by rote recitation and in passing only, or as dictum. *See, e.g., United States v. Tate*, 516 F.3d 459 (6th Cir. 2008); *United States v. Phinazee*, 515 F.3d 511, 517 n.4 (6th Cir. 2008); *See also United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008); *United States v. Vowell*, 516 F.3d 503, 510 (6th Cir. 2008); *United States v. Madden*, 515 F.3d 601, 613 (6th Cir. 2008); *United States v. Sedore*, 512 F.3d 819, 823 (6th Cir. 2008); *United States v. Carter*, 510 F.3d 593, 601 (6th Cir. 2007); *United States v. Smith*, 510 F.3d 603, 609 (6th Cir. 2007); *United States v. Lalonde*, 509 F.3d 750, 770 (6th Cir. 2007)(citing pre-*Gall* cases and suggesting in dictum and without further explanation that reliance on "impermissible factors" may constitute "extreme procedural unreasonableness" that "compel[s] the conclusion that the sentence is also substantively unreasonable").

In reversing Dr. Hunt's sentence based upon substantive reasonableness, the majority opinion

Sixth Circuit disregarded each of these post-*Gall* decisions.

In any event, the cases make altogether clear that so long as a factor is conceivably encompassed by the considerations under § 3553(a) and is not otherwise prohibited by statute or the Constitution, and so long as the district court supports its decision with "a reasoned appraisal," the court of appeals is no longer permitted to substitute its judgment that the factor is "impermissible." As stated by this Court in *Gall*, "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." 128 S. Ct. at 597. This is because: (1) "[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case;" (2) the sentencing court "sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record;" (3) the sentencing judge "has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court;" and, (4) the district court has "an institutional advantage over appellate courts in making these sorts of

determinations, especially as they see so many more Guidelines sentences than appellate courts do." *Id.* at 597-98 (internal quotation marks and citations omitted).

In addition, 18 U.S.C. § 3661 expressly provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence."

In light of the above, it becomes clear that the Panel majority in this case applied a standard of review for determining whether Dr. Hunt's sentence is substantively reasonable that is unsupported by current law (both of this Court and of other Sixth Circuit cases). Even worse, it relied on a so-called "impermissible factor" that it conjured through speculation about the district court's true motive and supported neither by the district court's statements on the record nor by relevant legal authority.

The Panel majority suggested that the district's "indications" of doubt constituted a "clearly erroneous" factual finding, and thus an "impermissible factor," subject to reversal as

substantively unreasonable. (App. B31-B32) However, *Gall* and every Circuit opinion issued since then clearly states that a sentence based on clearly erroneous facts is subject to reversal as *procedurally* unreasonable. *Gall*, 128 S. Ct. at 597. As a result, the Panel majority's discussion on this point was misplaced; the government conceded that the sentence was procedurally reasonable.

Viewed under the correct standard (the one set forth in *Gall*), the district court did not abuse its discretion by considering Dr. Hunt's relative culpability. Even interpreted as the district judge's doubts about the kind or degree of Dr. Hunt's intent, this is a factor that the district judge could reasonably consider as part of her examination of the "nature and circumstance of the offense." 18 U.S.C. § 3553(a)(1). The Guidelines themselves invite departures based on judicial findings that the defendant did not act with fully culpable intent, such as coercion and duress, victims' conduct, lesser harms, diminished capacity, and mitigating role. *See* U.S.S.G. §§ 3B1.2, 5K2.10, 5K2.11, 5K2.12, 5K2.13. As such there can be no principled justification for labeling the factor considered by the district court here as categorically "impermissible."

Finally, in determining that "innocence" is an

"impermissible factor," the majority attached significant weight to the concept that "[n]othing in § 3553(a) suggests that Congress intended that sentencing judges should rely on a defendant's innocence when the defendant has already been found guilty beyond a reasonable doubt." (App. B31-B32) While the district court did not, in fact, rely on "innocence," this reasoning needs correction. Section 3553(a) contains broad categories stated in general terms. If every particular factor not expressly included therein may be deemed "impermissible," there will soon be nothing left of it.

Because several Circuit decisions issued since *Gall* have set forth fundamentally conflicting standards regarding review for substantive reasonableness, and because the one applied by the Panel majority in this case is in direct conflict with *Gall*, granting this Petition is necessary to clarify the proper standard in light of *Gall* and to correct the misapplication here.

CONCLUSION

For reasons stated herein, the Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Order Denying
Petition for Rehearing,
filed 08/22/08 ..... A1 - A2

Opinion,
filed 04/11/08 ..... B1 - B48

Judgment,
filed 04/11/08 ..... C1 - C1

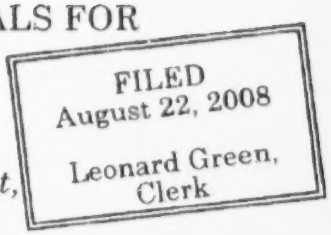
MIDDLE DISTRICT OF TENNESSEE FILINGS:

Judgment,
filed 09/08/06 ..... D1 - D16

Excerpt of Transcript of
Sentencing Hearing (pp. 114-131)
Held on 09/01/06 ..... E1 - E23

No. 06-6300/6301

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT



UNITED STATES OF AMERICA,
Plaintiff -Appellee/Cross-Appellant,

v.

RUSSELL WAYNE HUNT,
Defendant -Appellant/Cross-Appellee.

BEFORE: MARTIN, SILER, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en bane, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

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*Judge Daughtrey recused herself from participation in this ruling.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green
Clerk

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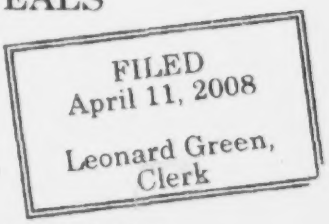
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



UNITED STATES OF AMERICA,
Plaintiff-Appellee/Cross-Appellant,

v. Nos. 06-6300/6301

RUSSELL WAYNE HUNT,
Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 04-00 135-Aleta Arthur Trauger,
District Judge.

Argued: November 28, 2007
Decided and Filed: April 11, 2008

Before: MARTIN, SILER, and ROGERS,
Circuit Judges.

COUNSEL

ARGUED: Kimberly S. Hodde, HODDE & ASSOCIATES, Nashville, Tennessee, for Appellant. Jimmie Lynn Ramsaur, ASSISTANT UNITED

STATES ATTORNEY, Nashville, Tennessee, for Appellee. **ON BRIEF:** Kimberly S. Hodde, HODDE & ASSOCIATES, Nashville, Tennessee, Richard J. Braun, BRAUN & CROTWELL, PLLC, Nashville, Tennessee, for Appellant. Jimmie Lynn Ramsaur, ASSISTANT UNITED STATES ATTORNEY, Nashville, Tennessee, for Appellee.

ROGERS, J., delivered the opinion of the court, in which SILER, J., joined. MARTIN, J. (pp. 12-15), delivered a separate opinion concurring in part and dissenting in part.

OPINION

ROGERS, Circuit Judge. Following a jury trial, Russell Wayne Hunt was convicted of health care fraud in violation of 18 U.S.C. § 1347, conspiracy to commit health care fraud in violation of18 U.S.C. § 371, and making false statements relating to health care fraud in violation of 18 U.S.C. § 1035. He was sentenced to five years of probation, a $6,000 fine, a $1,200 special assessment, and restitution in the amount of $151,161.78, to be paid jointly and severally with his co-conspirators. Hunt now argues that his convictions should be overturned because: (1) his Sixth Amendment right to present his own witnesses and establish his defense was violated by

the Government's ensuring that two primary defense witnesses would not be available to testify at trial; (2) the district court erred by refusing to admit exculpatory hearsay statements made by a codefendant; and (3) there was insufficient evidence to support his convictions. In the alternative, Hunt contends that the restitution order must be modified because the district court incorrectly calculated the amount owed. For its part, the Government, in a cross-appeal, contends that the sentence imposed by the district court is substantively unreasonable. Hunt's arguments are unavailing, but the Government is correct that his sentence is substantively unreasonable. Therefore, we affirm Hunt's convictions while vacating his sentence and remanding the case for resentencing.

I.

At the times relevant to this case, Russell Wayne Hunt was a physician licensed to practice medicine in the state of Tennessee. This case revolves around his involvement with mobile diagnostic testing companies owned by Mark Noble, who pled guilty to making false statements related to health care matters. From 1999 until 2001, Noble was the operator and part owner of a mobile diagnostic

testing company called Vascular Check, Inc. ("VCI"), and between 2002 and 2003, he was the owner and operator of an identical company known as Health Tech Screenings ("HTS"). Those companies performed carotid artery ultrasound tests, which allow doctors to determine whether there is blockage in the carotid artery that could lead to a stroke. The tests were performed throughout the state of Tennessee, typically at places like senior citizens' centers and trade shows. VCI and HTS both billed Medicare and Blue Cross/Blue Shield for the services. Medicare and private insurance only pay for diagnostic tests that have been determined to be medically necessary by a treating physician or a nurse practitioner or physician's assistant working under the license of a treating physician.

Hunt became acquainted with Noble in 1999, shortly after Hunt had opened his own private practice. Noble informed Hunt about the health fairs and corporate events that Noble's company attended, and Hunt decided that setting up a booth at such events would be a good way to market his new practice. Hunt's attendance at those events allowed him to become more familiar with Noble's enterprises by observing them. Eventually, Noble asked if Hunt would be willing to evaluate patients on behalf of

Noble's company at those events. Hunt's role was to review a medical history questionnaire filled out by a patient, perform an examination on the patient, and then make a determination as to whether the carotid artery ultrasound test was medically necessary.

At some point in 2001, Hunt informed Noble that he was too busy in his private practice to continue seeing patients on behalf of Noble's company. Hunt provided Noble with a list of nurse practitioners and suggested that Noble hire someone off that list to see patients under Hunt's medical license. Noble never hired a nurse practitioner though. Instead, Noble simply began bringing the medical history questionnaires and the unsigned orders to Hunt after the tests had already been performed, and Hunt would then sign the orders without having seen the patients. After Hunt signed the orders without having seen or examined the patients, Noble would submit claims to Medicare in order to receive payment for the tests. For his trouble, Hunt received $10 per signature from Noble. If a particular patient had private insurance through Blue Cross/Blue Shield, Noble would submit a claim to that company for the test, and Hunt would also submit a claim for his "consultation" with the patient.

In the claims that he submitted to Blue Cross/Blue Shield, Hunt billed under a consultation code that requires a face-to-face examination of the patient.

In 2002, the government began investigating Noble and his companies on suspicion of Medicare fraud. During the investigation, Hunt told special agents from the Department of Health and Human Services that he was not paid $10 per signed order, and that all of the tests had been ordered before they were performed. Neither statement was true. In addition, Hunt claimed that a nurse practitioner working under his license was examining the patients, although he admitted that he had never met that person, did not know that person's name, and had not confirmed that person's credentials.

As a result of the investigation, Hunt, Noble, and Patricia Reed, one of Noble's employees, were indicted in August of 2004 for health care fraud, conspiracy to commit health care fraud, and making false statements relating to health care matters. Noble subsequently pled guilty to making false statements relating to health care matters, and he was sentenced to 37 months in prison, three years of supervised release, and payment of restitution in the amount of $242,738. Reed pled guilty to assisting in making a false statement involving a federal health

care program, and she was sentenced to four years of probation and ordered to pay restitution in the amount of $19,000. Dr. Bartee, another physician who signed orders for Noble's companies, negotiated a pretrial diversion agreement with the Government. Unlike Hunt, Dr. Bartee appears to have physically examined patients before ordering the tests, and he stopped signing orders for Noble in 2002 after becoming suspicious about the legality of Noble's conduct.

A superseding indictment of Hunt was issued on July 20, 2005. Hunt maintained his innocence and proceeded to trial. During the trial, he sought to have admitted into evidence two hearsay statements from an affidavit made by Noble during the investigation. In those statements, Noble said, "I don't feel Doctor Russell Hunt, Dr. Moore, Dr. Bartee1did anything wrong," and "Dr. Hunt does not know that RN Haines [sic] is represented as a PA."[1] The district court ruled both statements inadmissible. Hunt also sought to elicit testimony from Noble and Dr. Bartee, but they

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[1]The latter statement refers to Diane Haynes, a registered nurse who worked for Noble. She was occasionally represented to patients as a physician's assistant.

both refused to testify on Fifth Amendment grounds. Dr. Bartee refused to testify because of concerns about how his testimony might affect his diversion agreement, which had not been finalized by the time of trial, and Noble refused to testify because of his exposure to potential prosecution in other districts.

After the jury convicted Hunt on all counts, his sentencing hearing was held on September 1, 2006. Although the Guidelines Range was from 27 to 33 months of imprisonment, the district court sentenced Hunt to five years of probation. In reaching that decision, the district court engaged in a lengthy discussion of the evidence that it believed to be indicative of a lack of fraudulent intent on Hunt's part. Ultimately, the district court concluded that Hunt had been "hoodwinked" by Noble. The district court also expressed great concern about the fact that several individuals whom the court considered to be equally culpable had not been prosecuted. The district court also appears to have given weight to the fact that Hunt would probably lose his medical license, as well as the fact that the carotid artery ultrasound tests performed on the patients did not hurt anyone and may have significantly helped many individuals. The district court also considered that Hunt was a well-liked and well-respected physician

who worked hard to break out of his humble background. In addition to probation, the district court ordered Hunt to pay a $6,000 fine, a $1,200 special assessment, and restitution in the amount of $151,161.78, which he would owe jointly and severally with the other defendants.[2] Hunt was further ordered to pay $50,000 of the restitution within 60 days.

II.

The Government did not violate Hunt's Sixth Amendment right to present his own witnesses and establish a defense because there were no prosecutorial "actions aimed at discouraging defense

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[2]Hunt received $7,678.88 from Blue Cross/Blue Shield for the "consultations" that he billed, and he was paid a total of $3,710 by Noble's companies. Therefore, Hunt's profits were at least $11,388.88. Noble's companies were paid a total of $113,247.85 from Medicare for the tests ordered by Hunt, and Noble's companies were also paid a total of $30,235.05 from Blue Cross/Blue Shield for tests ordered by Hunt. Altogether, the total loss sustained by Medicare and Blue Cross/Blue Shield as a result of Hunt's actions was $151,161.78. Hunt does not dispute these calculations.

witnesses from testifying ...." *United States v. Emuegbunam*, 268 F.3d 377, 400 (6th Cir. 2001) (citing *Webb v. Texas*, 409 U.S. 95,98 (1972); *United States v. Thomas*, 488 F.2d 334,336 (6th Cir. 1973)). It is true that two potential defense witnesses - Mark Noble and Dr. Bartee - refused to testify on Fifth Amendment grounds, but the Government did nothing to discourage or inhibit them from testifying. Indeed, the Government was not even the cause-in-fact of their refusals to testify.

Hunt argues that the Government deprived him of his rights by intentionally placing Noble and Dr. Bartee in positions where they would be likely to assert their Fifth Amendment rights not to testify. Specifically, Hunt points out that the Government continued Noble's sentencing hearing until after Hunt's trial and that the Government had failed to reach a diversion agreement with Dr. Bartee prior to Hunt's trial. This argument, however, ignores key facts. First, the Government said at the pretrial hearing that it had no objection to sentencing Noble before the trial. Noble's lawyer, however, indicated to the court that his client would refuse to testify regardless of whether or not he had been sentenced because there was a chance that he might be

prosecuted for related conduct in other districts.[3]

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[3]Noble was exposed to further prosecution in the Eastern District of Tennessee because he committed some of the same criminal acts in that district as he did in the Middle District. Therefore, his assertion of the Fifth Amendment was valid because he had reasonable cause to apprehend a real danger of incriminating himself if he were to be prosecuted in the Eastern District. *See In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983). Hunt contends, however, that Noble's assertion of his Fifth Amendment right was not valid because the policies expressed in the U.S. Attorney Manual made it highly unlikely that Noble would actually be prosecuted in the Eastern District. That argument ignores the fact that the U.S. Attorney Manual is intended only for internal guidance and does not affect the rights of parties. *See* U.S. Attorney Manual, § 9-2.031(F). Therefore, Hunt cannot force Noble to testify simply because the Manual expresses a general policy against prosecuting him in another district. Aside from that fact, however, the Manual provides that the general policy can be disregarded in certain situations. It is possible that Noble's testimony could uncover new facts or paint his conduct in a new manner so as to place him in one of those scenarios. Moreover, Noble's situation could have fit within one of those scenarios even without any new information arising from his testimony. As a result, Noble had reasonable cause to apprehend a real danger of incriminating himself.

Second, the Government and Dr. Bartee failed to reach an agreement on pretrial diversion prior to Hunt's trial not because of any fault on the part of the Government, but because Dr. Bartee himself was delaying the process so that he could determine how best to structure the agreement in order to avoid disciplinary issues with the Tennessee Board of Medical Examiners. Thus, because the facts indicate that the Government did not do anything to ensure that Noble and Dr. Bartee would be unavailable to testify at trial, the Government did not interfere unconstitutionally with Hunt's right to present his own witnesses and establish his defense.

III.

There was also no error in the district court's refusal to admit the two hearsay statements from Noble's affidavit. Hunt alleges that the statements are admissible under Rule 804(b)(1) or Rule 807 for the truth of the matter asserted, or in the alternative, under Rule 806 for the purpose of impeachment. We review such admissibility determinations for abuse of discretion. *United States v. Ganier*, 468 F.3d 920, 925 (6th Cir. 2006). Because neither statement is admissible under any of the Federal Rules of

Evidence, it cannot be said that the district court abused its discretion in excluding them.

Preliminarily, we question whether the affidavit statements satisfy the general requirements for admissibility. The statement that "Dr. Hunt does not know that RN Haines [sic] is represented as a PA," is arguably not admissible as not based on the witness's personal knowledge. Fed. R. Evid. 602. Noble's statement that "I don't feel Doctor Russell Hunt, Dr. Moore, Dr. Bartee did anything wrong," is arguably not admissible as an opinion by a lay witness that is not "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701; *see also Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985) (a lay opinion is not helpful if it "would merely tell the jury what result to reach .... ").

Assuming, however, that the affidavit statements meet the general admissibility requirements of Rules 602 and 701, they are nonetheless not admissible because they are hearsay. First, the prior testimony exception is not applicable. Rule 804(b)(1) permits hearsay to be received into evidence if the declarant is unavailable to testify as a witness and the hearsay was given as testimony "at another hearing of the same or a different proceeding,

or in a deposition taken in compliance with law in the course of the same or another proceeding .... " Fed. R. Evid. 804(b)(I). The affidavit in question was not given at a hearing or in a deposition. Instead, it was made during an interview with government agents. A hearing connotes some kind of adversarial proceeding presided over by an impartial third party, while "deposition" is a term of art referring to the out-of-court adversarial questioning of a witness under oath. Writing and signing a narrative affidavit during an interview with Government officers plainly is not the same as testimony given during a hearing or deposition.

Furthermore, the statements fail Rule 804(b)(I)'s additional requirement that the party against whom the former testimony is offered have had "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *Id.* Although Hunt is required to show that the Government had a similar motive to develop the testimony at trial as it had at the time the affidavit was made, *see United States v. Salerno*, 505 U.S. 317, 322 (1992), he has presented no argument on that issue. Indeed, it is unlikely that he could demonstrate that the Government agents who were conducting the investigation had a similar motive to

develop the statements as the prosecution had at trial. The motives of Government agents who are talking to a suspect during an investigation are different from the motives of prosecutors at trial. In the former situation, the Government agents desire to obtain information from the suspect without revealing the information that they already have. Therefore, it is not necessarily in their best interest to cross examine the declarant or to try to paint a picture of the truth as they understand it. At trial, however, it is in the Government's best interest to lay all of its cards on the table so that the unvarnished truth can be presented publicly to the jury. Because Hunt has not demonstrated that the Government had a similar motive, and because the statements were not given at a hearing or deposition, the statements are not admissible under Rule 804(b)(1).

Additionally, the statements are not admissible under Rule 807, the residual hearsay exception. Rule 807 allows for the admission of hearsay statements that are not specifically covered by Rule 803 or 804 so long as: (1) they have equivalent circumstantial guarantees of trustworthiness, (2) they are offered as evidence of a material fact, (3) they are more probative on the point for which they are offered than any other

evidence which the proponent can procure through reasonable efforts, and (4) their admission will best serve the general purposes of the Rules of Evidence and the interests of justice. Fed. R. Evid. 807. The district court in this case made a finding that the hearsay statements at issue lack trustworthiness, and Hunt has not demonstrated that finding to be clearly erroneous. Hunt argues that it is reasonable to conclude that the statements are truthful because they tend to incriminate the declarant, Noble, while exculpating Hunt. However, it is at least equally reasonable to conclude that the statements are not trustworthy. It would not be bizarre for an individual to lie in order to protect another individual with whom he has a business relationship. More importantly, a statement is not rendered trustworthy simply by the fact that it tends to exculpate one other than the declarant. This principle is seen clearly in Rule 804(b)(3), which says that a statement that exposes the declarant to criminal liability while exculpating the accused is not admissible unless corroborating circumstances indicate its trustworthiness. The absence of such corroborating circumstances in this situation indicates that the affidavit statements lack circumstantial guarantees of trustworthiness equivalent to those found in Rule

803 or 804. Thus, it is not clear that the statements bear the requisite trustworthiness. The district court accordingly made a reasonable decision to exclude the statements on the basis of untrustworthiness. The reasonableness of that decision leads to the conclusion that it was not an abuse of discretion.

The statements are also not admissible under Rule 806 for the purpose of impeachment. Rule 806 allows for the impeachment of hearsay evidence in any manner that would be allowed if the hearsay declarant had testified as a witness, and Hunt argues that the two statements at issue should be admitted to impeach certain statements made by Noble on an undercover video that was made by the Government during its investigation and shown to the jury at trial. At one point on the video, Noble states that Hunt sometimes examines the patients himself and sometimes sends a physician's assistant under his license. Hunt argues that this statement is inconsistent with Noble's affidavit statement about RN Haynes, and that the affidavit statement could therefore be introduced to impeach the videotaped statement. The argument fails because there does not appear to be any inconsistency between the two statements. It is entirely possible for Hunt to send a physician's assistant under his license while also

being unaware that RN Haynes is sometimes represented as a physician's assistant. In any event, the district court's determination that there were no inconsistencies between the statements was neither a clearly erroneous determination nor an abuse of discretion. Because it is not clear that the statements are inconsistent, the district court properly determined that the affidavit statement about RN Haynes was not admissible under Rule 806. Hunt also alleges that Noble's statement that Hunt did not do anything wrong is inconsistent with various statements on the videotape concerning Hunt's knowledge, but he fails to point out any particular inconsistencies. We therefore uphold the district court's ruling on that issue as well.

Finally, the Confrontation Clause does not compel the admission of the affidavit statements for the purpose of impeachment. Although Hunt is correct that the purpose of the Confrontation Clause is to guarantee defendants an opportunity to cross-examine and attack the credibility of witnesses and hearsay declarants, it is also true that the Confrontation Clause leaves the trial judge with authority to place reasonable limits on cross-examination. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). What is important is that the

defendant have "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15,20 (1985) (per curiam). Hunt had ample opportunity throughout the trial, particularly during his own testimony, to engage in the effective impeachment of Noble's credibility. Therefore, the district court's exclusion of the inadmissible affidavit statements was not a violation of Hunt's confrontation rights.

IV.

Hunt's sufficiency-of-the-evidence argument also fails because a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In reviewing the sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution. *See id.* A defendant faces a very heavy burden in challenging the sufficiency ofthe evidence, *see United States v. Garrido*, 467 F.3d 971, 984 (6th Cir. 2006) (citing *United States v. Tocco*, 200 F.3d 401, 424 (6th Cir. 2000)), and an analysis of Hunt' s three offenses shows that he has not met that burden.

A. Health Care Fraud

There is sufficient evidence to support Hunt's conviction of health care fraud because circumstantial evidence allows a rational trier of fact to find beyond a reasonable doubt that Hunt caused bills to be submitted to Medicare and Blue Cross/Blue Shield for patients that he had never seen and tests that had not been determined to be medically necessary. To obtain a conviction for health care fraud under 18 U.S.C. § 1347, the Government must prove that Hunt: "(1) knowingly devised a scheme or artifice to defraud a health care benefit program in connection with the delivery of or payment for health care benefits, items, or services; (2) executed or attempted to execute this scheme or artifice to defraud; and (3) acted with intent to defraud." *United States v. Raithatha*, 385 F.3d 1013, 1021 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1136 (2005). Additionally, one who aids and abets another in committing an offense is punishable as a principal. 18 U.S.C. § 2. Aiding and abetting requires: "(1) an act by a defendant which contributes to the execution of a crime; and (2) the intent to aid its commission." *United States v. Davis*, 306 F.3d 398, 409 (6th Cir. 2002) (quoting *United States v. Lowery*, 60 F.3d 1199,

1202 (6th Cir. 1995". Thus, regardless of whether Hunt was actually the person who devised the fraudulent scheme, he is still guilty of health care fraud because the evidence is sufficient to support a fmding that he contributed to the execution of the scheme with the intent to defraud.

Medicare and private insurance will only pay for diagnostic tests that have been ordered as medically necessary by a treating physician or a nurse practitioner or physician's assistant working under such a physician. There is ample evidence that Hunt defrauded Medicare and Blue Cross/Blue Shield by causing claims to be submitted for tests that had not been determined to be medically necessary. The Government's expert testified at trial that a determination as to medical necessity could not have been made solely based on the questionnaires filled out by the patients. Therefore, an in-person examination would have been required to make that determination. Hunt does not dispute that he did not examine the patients, but instead he claims that he lacked the requisite intent to defraud because he had a good faith - albeit erroneous - belief that the patients were being examined on-site by a nurse practitioner. A rational trier of fact, however, could be convinced beyond a reasonable doubt that Hunt's

claim is a sham. Tennessee law requires the relationship between a nurse practitioner and supervising physician to be governed by a written protocol, and both parties are required to review the protocol and sign a form saying that they understand it. In his trial testimony, Hunt admitted that he never went over any such protocol with the nurse practitioner who was allegedly seeing patients on his behalf. Because he never reviewed the protocol with the nurse practitioner- or even interacted with the alleged nurse practitioner in any way - a rational jury could infer that Hunt knew that the nurse practitioner did not exist. That conclusion is also supported by Hunt's unbelievable assertion that he submitted a list of names to Noble and believed on blind faith that Noble had hired a nurse practitioner from that list. It is highly unlikely that a physician would allow a nurse practitioner to practice under his license without ever having checked the credentials - or the identity, for that matter - of the nurse practitioner. In other words, a jury could rationally conclude that Hunt was not concerned about the identity or credentials of the nurse practitioner because he knew that the nurse practitioner did not exist. Therefore, a rational jury could conclude that Hunt ordered tests with knowledge that the patients

had never been examined by him or a nurse practitioner or physician's assistant working under his license. It follows that there is sufficient evidence to conclude that Hunt intentionally contributed to the commission ofhealth care fraud by causing claims to be submitted on the false pretenses that they had been determined to be medically necessary by a qualified medical professional.

The conclusion that Hunt acted with intent to defraud Blue Cross/Blue Shield is further buttressed by the fact that he submitted claims under a consultation code requiring a face-to-face examination of the patients. Julie Davis, Hunt's billing clerk, testified that it was Hunt who decided which codes to bill under. When Davis's testimony is combined with the rational conclusion that Hunt knew that neither he nor a nurse practitioner had seen the patients, a rational trier of fact could easily come to the conclusion that Hunt knowingly submitted improper billing codes in order to be paid for work that he had not actually performed. Hunt, however, claims that he was unknowledgeable about billing matters, that he relied completely on Davis, and that he made the innocent mistake of billing for a "consultation" when he should have billed for a "remote office visit." He further argues that the

innocence of the mistake is demonstrated by the fact that the consultation code pays slightly less money than the remote office visit code. There is no evidence, however, to demonstrate that Hunt would have been entitled to receive payment even under the remote office visit code. There is no proof that a face-to-face examination is not required under the remote office visit code. On its face, the term "remote office visit" implies that the billing physician visited with the patient. The fact that the remote office visit code pays more than the consultation code is meaningless if Hunt was not entitled to bill for either code because he did not conduct a faceto-face examination of the patients. Thus, the evidence indicates that Hunt's fraudulent bills to BlueCross/Blue Shield were not simply innocent mistakes.

The absence of innocent mistake in Hunt's conduct is further confirmed by a phone call that he made to Laura Jarrell in the spring of 2005, which was after his indictment, but before trial. Jarrell testified that she received a strange and agitated answering machine message from Hunt and that when she returned the call, his office said that he just wanted to know if Jarrell remembered seeing Hunt at the 2002 Southern Women's Show, where

Jarrell had received a carotid artery ultrasound test from HTS. Hunt's call to Jarrell could reasonably be interpreted as displaying consciousness of guilt and as an attempt to conceal unlawful activity by convincing Jarrell that she had seen Hunt in person. Such an interpretation constitutes valid circumstantial evidence of intent to defraud because this court has held that intent can be inferred "from efforts to conceal the unlawful activity .... " *See United States v. Davis*, 490 F.3d 541, 549 (6th Cir. 2007).

Finally, a critical consideration in weighing the sufficiency of the evidence on the health care fraud conviction is the fact that the case against Hunt essentially boils down to the jury's choice between believing Hunt's claims to have made innocent mistakes and the Government's circumstantial proof that he knowingly committed fraud. After witnessing Hunt's demeanor and testimony, the jury decided that it simply did not believe his excuses. The jury found the Government's story to be more credible, and that decision is entitled to a high degree of deference. *See United States v. Latouf*, 132 F.3d 320, 330-31 (6th Cir. 1997). Hunt has not presented an argument persuasive enough to overcome that deference.

B. Conspiracy to Commit Health Care Fraud

Hunt's conspiracy conviction is supported by sufficient evidence because there was circumstantial evidence that Hunt and Noble tacitly agreed to defraud Medicare and private insurance. A conspiracy charge requires the Government to "prove an agreement between two or more persons to act together in committing an offense, and an overt act in furtherance of the conspiracy." *United States v. Crossley*, 224 F.3d 847, 856 (6th Cir. 2000) (quoting *United States v. Milligan*, 17 F.3d 177, 182 (6th Cir. 1994)). The Government need not show a formal written agreement. *See id.* Instead, it is sufficient to demonstrate a tacit or mutual understanding among the parties. *See id.* (quoting *United States v. Ables*, 167 F.3d 1021, 1031 (6th Cir. 1999". Likewise, direct evidence of the conspiracy is not necessary. It is enough to present "[c]irumstantial evidence which a reasonable person could interpret as showing participation in a common plan .... " *Id.* (citing *Ables*, 167 F.3d at 1031).

A chain of reasonable inferences leads to the rational conclusion that Hunt tacitly agreed to sign orders for patients he had never examined so that he and Noble could submit bills for their services to Medicare and private insurance. First, the evidence

supports a finding that Hunt knew Noble was billing Medicare and private insurance and that the orders needed to be signed by a physician in order for those bills to be paid. Hunt explicitly admitted that he knew that Noble was billing private insurance, and he also admitted that he saw the Medicare patients' Medicare cards because they were attached to the forms that the patients had filled out. It is hard to imagine what Hunt thought Noble was doing with the patients' Medicare cards ifnot billing for the tests. Based on the previously reached conclusion that a rational jury could determine that Hunt knew that neither he nor a nurse practitioner had examined the patients, it is rational to conclude that Hunt understood that his role was to sign the orders so that Noble could get paid for tests that had not been validly ordered. Therefore, a rational trier of fact could come to the conclusion that Hunt tacitly agreed to a fraudulent scheme and then committed an overt act in furtherance of it by ordering the tests. Hunt's membership in the conspiracy is supported by the fact that he signed the orders after the tests had been performed, and by the fact that Noble paid him $10 per signature.

C. False Statements Relating to Health Care Matters

To establish guilt under 18 U.S.C. § 1035 for making false statements relating to health care matters, the Government must prove that the defendant knowingly and willfully made false statements or representations "'in connection with the delivery of or payment for health care benefits, items, or services' and in a 'matter involving a health care benefit program.'" *United States v. Canon*, 141 F. App'x 398, 405 (6thCir. 2005) (quoting 18 U.S.C. § 1035(a)(2)). As the foregoing analysis demonstrates, a rational jury could conclude that Hunt knowingly and willfully made false representations of the medical necessity of the tests by signing orders without actually examining the patients or truly determining that the tests were medically necessary. Moreover, the jury could reasonably conclude that he made those misrepresentations so that Noble's company could receive payment. Thus, it would be reasonable for a jury to find that the misrepresentation occurred in connection with the payment for health care benefits. The foregoing analysis also demonstrates that Hunt fraudulently submitted claims to Blue Cross/Blue Shield under a consultation code requiring a face-to-face

examination of the patient when no such examination had occurred. Therefore, a rational jury could also find that Hunt knowingly and willfully made false statements in order to obtain payment from Blue Cross/Blue Shield for services that he did not perform.

V.

The district court's restitution order was not an abuse of discretion in this case. Hunt argues that the district court erroneously calculated the amount of restitution that he owes. We review such a challenge for abuse of discretion. *See United States v. Guardino*, 972 F.2d 682, 686 (6th Cir. 1992). An abuse of discretion occurs when the reviewing court is left with the "definite and firm conviction that the trial court committed a clear error of judgment." *Dubay v. Wells*, 506 F.3d 422, 431(6th Cir. 2007) (quoting *Revis v. Meldrum*, 489 F.3d 273,280 (6th Cir. 2007)).

The district court properly ordered Hunt to pay restitution in the full amount of the losses that he caused Medicare and Blue Cross/Blue Shield to suffer. District courts are required to order restitution in the full amount of each victim's loss. *See* 18 U.S.C. § 3664(f)(1)(A). The term "victim" is

defined as "a person directly and proximately harmed" by a defendant's offense." 18 U.S.C. § 3663A(a)(2). Because Medicare and Blue Cross/Blue Shield would not have paid for the tests but for the presence of Hunt' s signature on the orders, Hunt was the direct and proximate cause of the harm suffered by those entities. The district court was therefore correct to order Hunt to pay restitution to those entities in the full amount of the losses that he caused. Hunt does not question the district court's calculation of the losses sustained by Medicare and Blue Cross/Blue Shield, nor does he argue that he should not have to pay restitution at all. Instead, he claims that he should only have to make restitution for the $7,678.88 that he personally received from Blue Cross/Blue Shield. That argument is plainly wrong because the statute says that Hunt must pay restitution for all of the losses that he caused, not simply the losses that wound up in Hunt's own pocket.

In addition, the district court was within its discretion to order Hunt to pay $50,000 of the restitution within 60 days. Section 3664(f)(2) provides that once the amount of restitution has been determined, the district court shall specify "the manner in which, and the schedule according to

which, the restitution is to be paid .... " Section 3664(f)(2)(A) requires the district court in making that determination to take into account the financial resources of the defendant. Therefore, it was not, as Hunt contends, an abuse of discretion for the district court to order him to pay $50,000 within 60 days based on the fact that he has substantial financial resources.

Moreover, the district court did not abuse its discretion by ordering joint and several liability . In cases involving multiple defendants, § 3664(h) explicitly gives district courts discretion as to whether they should apply joint and several liability or whether liability should be apportioned among the defendants based on their economic circumstances and their respective contributions to the victims' losses. There is nothing to suggest that the district court abused its discretion by ordering joint and several liability in this case.

VI.

Lastly, although the question is close because of the limited abuse-of-discretion review prescribed by *Gall v. United States*, _ U.S. _, 128 S. Ct. 586, 597 (2007), the Government is correct that Hunt's sentence is substantively unreasonable. A district

court imposes a substantively unreasonable sentence, and thereby abuses its discretion, when it bases the sentence on impermissible factors, *see United States v. Brown*, 501 F.3d 722, 724 (6th Cir. 2007), and it appears that the district court may have done that in relying on indications that Hunt was not guilty as found by the jury.

The district court appears to have relied in substantial part on its doubt that Hunt intended to commit fraud. If the district court did so rely, then it is necessary for us to remand under the abuse-of-discretion scope of review. This is because it would be improper for the judge in sentencing to rely on facts directly inconsistent with those found by the jury beyond a reasonable doubt. Indeed, we have stated repeatedly, albeit outside the sentencing context, that a district court abuses its discretion when it relies on clearly erroneous facts. *See Black Law Enforcement Officers Ass'n v. City of Akron*, 824 F.2d 475, 479 (6th Cir. 1987) (citing *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir. 1985)). And a factual determination is necessarily clearly erroneous where a jury has previously found to the contrary beyond a reasonable doubt. Nothing in § 3553(a) suggests that Congress intended that sentencing judges should rely

on a defendant's innocence when the defendant has already been found guilty beyond a reasonable doubt. Moreover, it does not matter that the district court relied on a number, even a large number, of relevant facts in its sentencing, if it also relied on facts that it could not properly consider. Thus we would not hesitate to reverse a sentence if a judge relied on numerous relevant facts but also relied, for instance, on the morning's horoscope.

The following give an indication that the district court relied in part on the defendant's not having had an intent to defraud in this case, a conclusion contrary to the jury verdict.

The court stated an "overarching impression" that defendant "might well have not been convicted by a jury" had it not been for the presence of Mr. Noble in the case. J.A. 809.

The court also stated that Hunt

> first of all, was hoodwinked by Mr. Noble, second of all was naive, third of all was trusting, fourth of all was unknowledgeable about the business part of the practice like many, many doctors and other healthcare professionals are, but most of all was motivated to do this because he thought it was a good test, and he thought that

> it would detect some things that would be helpful for people to detect.

J.A. 811. While this excerpt could be read as limited to a consideration solely of Hunt's motives for the crime, there is an unmistakable conveyance of the idea that Hunt did not have the intent to defraud.

The court also stated,

> There were many things that Dr. Hunt testified gave him a measure of comfort about what Mark Noble was doing, that militated against his having fraudulent intent.
>
> The jury found he had fraudulent intent, but the court can certainly consider those things in sentencing *despite the jury's finding*.

J.A. 816-17 (emphasis added).

The court also stated that Hunt's "background would not lead one to believe that he would jeopardize his medical license by knowingly committing a fraud from which he made very little money." J.A. 818.

These statements, in the context of the general tenor of the district court's remarks, see J.A. 813-18,

certainly permit-if they do not require-the conclusion that in sentencing the district court relied in part on the absence of fraudulent intent on the part of the defendant.

It is true that the district court also relied on a number of factors that were either proper or arguably proper, such as how little money the defendant made off the scheme, the allegedly limited amount of harm to patients, the personal circumstances of the defendant, the effect on the defendant of losing his license, and how valuable the defendant was to the community. But such arguably proper reliance does not cure actual reliance on the perceived innocence of the defendant, any more than in the horoscope example above.

The defendant here has been excused from any imprisonment, despite a Guidelines range of 27 to 33 months. That fact alone, as the Supreme Court's recent holding in *Gall* makes clear, is not enough to conclude that the sentence is unreasonable. The Court in *Gall* moreover directs us to accord great deference to district court sentencing determinations under the abuse of discretion standard. But if the standard of review is to have any teeth, it has to require at least a remand where the district court appears to have relied upon factors that cannot be

legitimately relied upon. This case is unlike the particular facts of *Gall* because Gall's lenient sentence was not based on the district court's consideration of Gall's lack of culpability. Instead, the district court in *Gall* merely considered numerous facts indicating that Gall had redeemed himself since the time of his offense. *See Gall*, 128 S. Ct. at 593. The district court in *Gall* did not appear to rely on a consideration that Gall was innocent of the crime for which he stood convicted.

VII.

For the foregoing reasons, Russell Wayne Hunt's convictions are AFFIRMED, his sentence is VACATED, and the case is REMANDED.

CONCURRING IN PART, DISSENTING IN PART

BOYCE F. MARTIN, JR., Circuit Judge, concurring in part and dissenting in part. I concur in the majority with respect to everything but the reversal of Hunt's sentence. Because I believe the majority is in conflict with the Supreme Court's recent decision in *Gall v. United States*, 128 S. Ct.

586 (2007), I respectfully dissent from its reversal of Hunt's sentence.

I.

The majority holds that it was substantively unreasonable for the district court to rely on an impermissible factor in determining Hunt's sentence. The impermissible factor the majority hangs its hat on is what it has termed Hunt's "innocence." This is the majority's mis-labeling of the fact that the district court found Hunt to be less culpable than other defendants involved in the fraudulent scheme and that the evidence against him was objectively weaker than that against other defendants. The district court did not rely on his "innocence;" Hunt was found guilty by a jury and that conviction will stay with him for the rest of his life. Instead, after a thorough and thoughtful analysis of the § 3553(a) factors, the district court found Hunt less culpable and sentenced him accordingly. That is not impermissible, and tellingly, the majority is unable to point to a single sentencing case in support of its holding.

The majority's mischaracterization of the district court's reasoning avoids the Supreme Court's holding in *Gall*, and this Court's own recent decision in *United States v. Grossman*, --- F .3d ----, No.

06-2310 slip op., 2008 WL 160612, at *4 (6th Cir. Jan. 18, 2008), both of which mandate that we give due deference to reasoned and reasonable sentencing decisions of district courts even when we, as an appellate court, may have chosen a different sentence. Instead of abiding by this clear standard of review, the majority has concocted a new impermissible factor which renders Hunt's sentence substantively unreasonable. But this mischaracterization of the district court's reasoning does not stand up to careful scrutiny.

The Supreme Court recently laid out the proper manner in which a district court should sentence a defendant. *Gall*, 128 S. Ct. at 596-97. Procedurally, the district court must properly calculate the guidelines range, *id.* at 596, give "both parties the opportunity to argue for whatever sentence they deem appropriate," *id.*, and consider "all of the § 3553(a) factors to determine whether they support the sentence requested by the parties," *id.* A district court must then "make an individualized assessment based on the facts presented," *id.* at 596-97, regardless of whether the sentence is above, below, or within the guidelines, id. After *Gall*, the calculation and analysis of the correct guidelines range is merely one ofthe several factors to

be considered, *id.*; *see also* 18 U.S.C. § 3553(a), and is not controlling or determinative of the sentence given. Finally, after deciding on a sentence, a district court is required "to adequately explain the chosen sentence," *Gall*, 128 S. Ct. at 597, "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range ... ," *id.*

Because the majority has focused on the district court's reliance of what it has termed an impermissible factor under § 3553(a), I will carefully layout the analysis undertaken by the district court under the § 3553(a) factors in reaching its sentencing decision. After doing so, I believe it is patently obvious that the district court did not rely on an impermissible factor, but rather merely found Hunt less culpable than other defendants and sentenced him accordingly.

I begin with the first factor under § 355 3(a), "the nature and circumstances of the offense and the history and characteristics of the defendant." The district court found that Hunt's prosecution and conviction was driven by his co-defendant who pled guilty and whose actions were far more egregious. The district court struggled with Hunt's motive for the crime given the dearth of evidence regarding his criminal intent. He made very little money ($11 ,000)

off of the scheme when compared to his overall practice which made several hundred thousand dollars a year. The district court found that Hunt was hoodwinked by his co-defendant Mark Noble, the ring-leader of the fraudulent scheme who the court termed "a snake-oil salesman, a medicine man." The district court found Hunt to be naive, overly trusting, and unknowledgeable about the business part of the practice. The district court also found that the evidence was very weak regarding Hunt's fraudulent intent. The district court also found that Hunt's actions caused no harm to any patients, and in fact may have been beneficial to several patients. The district court took into account Hunt's history and found he had a humble background, was the first person in his family to attend college, and that he had developed a successful practice. The district court took into account his character and found that his patients and other doctors have a very high opinion of him. The district court also found helpful several letters from members of the community written on Hunt's behalf stating that he was a holistic preventive doctor who believed in the tests at issue and thought they were beneficial.

With regard to the second factor under § 3553(a), the district court stated the sentence must

reflect the seriousness of the offense, must promote respect for the law, must provide a just punishment, must protect the public from further crimes, and it must provide the defendant with needed education or vocational training. The district court then took into account that Hunt would not be able to practice medicine in the foreseeable future. The district court found that losing his license alone provided a just punishment, promoted respect for the law, and protected the public from further crimes.

The district court also satisfied § 3553(a)(3)(5) by correctly calculating the recommended guidelines range. The district court then stated that "[t]he court under the present system takes into account the sentencing guideline. The sentencing guideline in this case in the context of all the factors that I have said is not an appropriate sentence for Dr. Hunt."

The district court also took into account § 3553(a)'s admonition that district court's "avoid unwarranted sentence disparities among defendants," finding that other doctors conducting the same activities as Hunt received pretrial diversion in one instance (Dr. Bartee) and received nothing in other instances (Dr. Moore and Dr. Adams). The district court noted that several other

more culpable individuals were not prosecuted at all, including individuals who profited much more from the enterprise than Hunt.

The district court stated that it felt it was important that Dr. Hunt practice medicine again because he was an asset to the community and provided a valuable resource to his patients. The district court stated that while his twelve felony convictions may preclude him from ever practicing again, the probationary sentence may help.

I fail to see, in all of the above reasoning given by the district court in its analysis of the § 3553(a) factors, where the district court took into account Hunt's "innocence." In fact, the district court explicitly stated that despite Hunt's "explanations for his behavior, ... there's no excuse for the behavior." The district court went further, stating that "[t]here were enough violations ... that the court cannot find that [Hunt] was totally innocent of any knowledge." These statements indicate that the district court did not impermissibly consider Hunt's "innocence." What the district court did do was take into account several mitigating factors and settle upon an individualized sentence, something that has been done in sentencing for more than three centuries. *See United States v. Phinazee*, --- F.3d ----, No. 06-5730 Slip op., 2008 WL

320774, at *13 (6th Cir., Feb. 7, 2008) (Merritt, J., dissenting).

When the majority's mis-labeling of the district court's reasoning is set aside, I believe that the Supreme Court's decision in *Gall*, and this Court's recent holding in *United States v. Grossman*, --- F.3d ----, No. 06-2310 slip op., 2008 WL 160612, at *4 (6th Cir., Jan. 18,2008), directly control and require that this Court affirm Hunt's sentence. The similarities between *Gall* and the present case are striking. In both cases, a district court exercised its legal authority to sentence outside the recommended guidelines range, and in both cases, sentenced the defendant well below the guidelines range to probation. *Gall v. United States*, 128 S. Ct. 586, 593 (2007). In both cases, the district court committed no significant procedural errors. Both correctly calculated the applicable guidelines range, allowed both parties to present arguments in support of what they believed to be appropriate sentences, considered all of the § 3553(a) factors, and thoroughly documented their reasoning behind the sentence imposed. *Id.* at 598.

In *Gall*, the district court sentenced the defendant to a term of probation after he pled guilty to being a part of a conspiracy to distribute ecstasy,

cocaine, and marijuana. Gall's plea agreement stipulated that he was "responsible for, but did not necessarily distribute himself, at least 2,500 grams of [ecstasy], or the equivalent of at least 87.5 kilograms of marijuana." *Id.* at 592. The presentence report recommended a guidelines range ono to 37 months' imprisonment. The district court decided to depart from the guidelines range and sentenced Gall to 36 months of probation. In support of this sentence, the district court stated that "considering all the factors under [§ 3553(a)], the Defendant's explicit withdrawal from the conspiracy almost four years before the filing of the indictment, the Defendant's post-offense conduct, especially obtaining a college degree and the start of his own successful business, the support of family and friends, lack of criminal history, and his age at the time of the offense conduct, all warrant the sentence imposed, ..." *Id.* at 593. The district court emphasized that Gall had voluntarily withdrawn from the conspiracy after seven months and that two of his co-conspirators, who had been sentenced 30 and 35 months' imprisonment respectively, had not withdrawn from the conspiracy. The fact that he was less culpable than his co-conspirators, despite his guilty plea, coupled with the overwhelming evidence in support

of mitigation, led the district court to sentence Gall to probation. I fail to see how the district court's determination in *Gall* is any different than the district court's decision in this case that Hunt be sentenced to a term of probation given his minor role in the fraudulent scheme and the similarly overwhelming evidence in support of mitigation.

The most damning similarity between this case and *Gall* is the fact that a circuit court of appeals has substituted what it believes to be the appropriate sentence instead of giving "due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 602. The Eighth Circuit reversed the district court in *Gall*, holding, among other things, that the district court gave too much weight to Gall's withdrawal from the conspiracy. *Id.* at 594. This sort of reasoning sounds eerily similar to that used by the majority in the present case: "A district court imposes a substantively unreasonable sentence, ... when it bases the sentence on impermissible factors, ... and the district court appears to have done just that in relying on indications that Hunt was not guilty as found by the jury." The majority obviously disagrees with the weight the district court gave to the sparsity of

evidence concerning Hunt's intent to defraud. But it was exactly this type of appellate review that the Supreme Court attempted to stamp out in *Gall*. The Supreme Court explicitly stated that even where "[t]he Court of Appeals clearly disagree[s] with the District Judge's conclusion that consideration of the § 3553(a) factors justified a sentence of probation, ... it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable." *Id.* at 602. Our own Circuit has re-emphasized this deferential standard of review in Grossman, holding that we must give "due deference to the sentencing judge's on-the-scene assessment of the competing considerations, which is to say, not just abuse-of-discretion review to the reasonableness of a sentence but abuse-of-discretion review to the district court's determination that there is a legitimate correlation between the size of the variance and the reasons given for it .... " 2008 WL 160612, at *3.

The majority has ignored the proper deferential standard of review and invented a new impermissible factor, "innocence," which will now allow appellate courts to reverse sentencing decisions regardless of whether an analysis of the § 3553(a) factors indicates that a defendant is less culpable

than others and that a sentence outside the guidelines is more appropriate. On remand, I hope the district court makes clear that it was not relying on Hunt's "innocence" when it sentenced him to probation, but was instead making a "reasoned and reasonable" decision that a term of probation was "sufficient, but not greater than necessary, to comply with the purposes" of § 3553(a), and imposes the same sentence, supported by the same detailed analysis.

II.

This case is an example of the perfect storm developing over the sentencing judges in this Circuit. As I have pointed out repeatedly, the struggle we have in the review of sentencing is to determine what was intended by the district court. All too often insufficient explanation is given to allow us to adequately review a district court's sentencing decision. In the present case, the sentencing judge gave us an extensive explanation of her reasoning, yet the majority not only rejects the district court's reasonable explanation as unreasonable, but finds that the sentence in this case was an abuse of discretion. Such a holding completely disregards this Circuit's decisions in *Grossman* and *Vonner*, and also

disregards the Supreme Court's decisions in *Gall*. I am unhappy to report that we have once again begun the slippery slope of agreeing with district court's who depart upward on the basis that they were reasonable and did not abuse their discretion, but when a judge decides to sentence below the non-binding guidelines, then we reverse and remand. In my view, this not only does not make sense, but is unprincipled. I am haunted by the words of the 19th century poet Matthew Arnold which sums up so much of the problems we face today with sentencing:

> "For the world which seems
> to lie before us like a land of dreams,
> so various, so beautiful, so new,
> Hath really neither joy, nor love, nor light,
> Nor certitude, nor peace, nor help for pain;
> And we are here as on a darkling plain
> Swept with confused alarms of struggle and
> flight, while ignorant armies clash by night."

Dover Beach, 1851.

Based on the foregoing reasons, I respectfully dissent from the majority's reversal of Hunt's sentence.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
April 11, 2008
Leonard Green,
Clerk

Nos. 06-6300; 06-6301

UNITED STATES OF AMERICA,
Plaintiff - Appellee/Cross-Appellant,

v.

RUSSELL WAYNE HUNT,
Defendant - Appellant/Cross-Appellee.

Before: MARTIN, SILER, and ROGERS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that defendant Russell Wayne Hunt's judgment of conviction by the district court is AFFIRMED. IT IS FURTHER ORDERED that the sentence imposed on the defendant is VACATED and the case is REMANDED for resentencing.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After
November 1, 1987)

FILED
September 8, 2006
Middle District of
Tennessee,
Clerk

UNITED STATES OF AMERICA
v.
RUSSELL WAYNE HUNT

CASE #: 3:04-00135-3
USM #: 16797-075

KIMBERLY S. HODDE, ESQ.
RICHARD JAMES BRAUN, ESQ.
DEFENDANT'S ATTORNEY

THE DEFENDANT:

[X] was found guilty on counts 1-12 of the Superseding Indictment after a plea of not guilty.

Accordingly, the Court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count #(s)
18 USC 371	Conspiracy to commit health care fraud	3/5/2003	1
18 USC 1347	Health care fraud	3/5/2003	2-7
18 USC 1035	False statements relating to health care fraud	3/5/2003	8-12

The defendant is sentenced as provided in this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States District Court and the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court

and the United States Attorney of material changes in economic circumstances.

September1, 2006
Date if Imposition of Judgment
/s/ Aleta A. Trauger
Signature of Judge
Aleta A. Trauger, U.S. District Judge
Name & Title of Judge

Date: 9/8/2006

PROBATION

The defendant is hereby sentenced to probation for a term of 5 years on counts 1-12 to run concurrently with each other.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not unlawfully possess a controlled substance.
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the Court.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ]The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments set forth in this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (as set forth below). The defendant shall also comply with

any additional, special conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reason;
6) the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any pamphemalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that

may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

PROBATION
SPECIAL CONDITIONS

1. The defendant shall pay restitution jointly and severally with codefendants Mark A. Noble and Patricia Reed to the victim identified in the presentence report in an amount totaling $151,161.78. Payments shall be submitted to the United States District Court Clerk's Office, Eighth Floor, 801 Broadway, Nashville, TN 37203. The defendant shall make an initial lump sum restitution payment of $50,000.00 within 60 days of sentencing. The defendant shall pay the remaining restitution at a minimum monthly rate of 10 percent of the defendant's gross monthly income. No interest shall accrue as long as the defendant remains in compliance with the payment schedule ordered. Pursuant to 18 U.S.C. § 3664(k), the

defendant shall notify the Court and United States Attorney of any material change in economic circumstances that might effect ability to pay

2. The defendant shall pay a fine in the amount of $6,000.00 within 60 days of being placed of being placed on supervision. Payment shall be submitted to the United States District Court Clerk's Office, Eighth Floor, 801 Broadway, Nashville, TN 37203.

3. The defendant shall pay the costs of supervision at $287.73 per month.

4. The defendant shall furnish all financial records, including, without limitation, earnings records and tax returns, to the U.S. Probation Office upon request.

5. The defendant shall not incur new debt or open additional lines of credit without the prior approval of the U.S. Probation Office unless the defendant is in compliance with the payment schedule for any court-imposed financial sanctions.

6. The defendant is prohibited from owning, carrying or possessing firearms, destructive devices or other dangerous weapons

4. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Office.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the Schedule of Payments set forth in this judgment.

Totals	Assessment	Fine	Restitution
	$1,200.00	$6000.00	$151,161,78

[ ] The determination of restitution is deferred until. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

[ ] The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximate proportioned payment, unless specified otherwise in the priority order or percentage column below. However, pursuant to 18

U.S.C. § 3664(1), all non-federal victims must be paid in full before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or %
(see attached)			

Totals: $ $

[ ] Restitution amount ordered pursuant to plea agreement $

[ ] The defendant must pay interest on any fine or restitution of more than $ 2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency, pursuant to 18 U.S.C. § 3612(g).

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*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

CRIMINAL MONETARY PENALTIES

ADDITIONAL RESTITUTION

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of Payment
CIGNA - Center for Medicare & Medicaid Services Division of Accounting Operations PO Box 7520 Baltimore, MD 21207.0520 RE: Mark A. Noble, Patricia Reed, and Russell Wayne Hunt Health Care Fraud Case		$113,247.85	
Blue Cross/Blue Shield of Tennessee Special Investigations Unit - 3G 801 Pine Street Chattanooga, TN 37402 RE: Case #10241		$37,913.93	

Totals: $ $151,161.78

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A [x] Lump sum payment of $ 158,361.78 (restitution plus fine and special assessment) due immediately, balance due

[ ] not later than _____, or

[x] in accordance with C, D, E, or F; or

B [ ] Payment to begin immediately (may be combined with C, D, or F); or

C [ ] Payment in equal ____ (e.g., weekly, monthly, quarterly) installments of $ ___ over a period of ___ (e.g. months or years), to commence ____ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal ____ (e.g., weekly, monthly, quarterly) installments of $ ___ over a period of ___ (e.g. months or years), to commence ____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within ___ (e.g. 30 or 60 days) after release from imprisonment.

The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [x] Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay restitution jointly and severally with codefendants Mark A. Noble and Patricia Reed to the victims identified in the presentence report in an amount totaling $151,161.78. Payments shall be submitted to the United States District Court Clerk's Office, Eighth Floor, 801 Broadway, Nashville, TN 37203. The defendant shall make an initial lump sum restitution payment of $50,000.00 within 60 days of sentencing. The defendant shall pay the remaining restitution at a minimum monthly rate of 10 percent of the defendant's gross monthly income. No interest shall accrue as long as the defendant remains in compliance with the payment schedule ordered. Pursuant to 18 U.S.C. § 3664(k), the defendant shall notify the Court and United States Attorney of any material change in economic circumstances that might effect ability to pay.

The defendant shall pay a fine in the amount of $6,000.00 within 60 days of being placed of being placed on supervision

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are to be made payable to the Clerk, U.S. District Court, located at 800 U.S. Courthouse, 801 Broadway, Nashville, TN 37203.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[x] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Mark A. Noble, 3:04-00135-1;

Patricia Reed, 3:04-00135-2

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest; (4) fine principal; (5) fine interest; (6) community restitution; (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA

vs. CASE NO. 3:04-00135

RUSSELL WAYNE HUNT

TRANSCRIPT OF PROCEEDINGS
SENTENCING HEARING

BEFORE: THE HONORABLE
ALETA A. TRAUGER

DATE: SEPTEMBER 1, 2006

TIME: 10:00 A.M.

APPEARANCES:

FOR THE GOVERNMENT:
JIMMIE LYNN RAMSAUR
U.S. Attorney's Office
Nashville, Tennessee

FOR THE DEFENDANT:
KIMBERLY HODDE
RICHARD BRAUN
Nashville, Tennessee

REPORTED BY:
BEVERLY E. "'BECKY" COLE, RPR CCR
OFFICIAL COURT REPORTER
A-837 U.S. COURTHOUSE
NASHVILLE, TN 37203
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recommend a sentence to the court -- I know the court has isn't asked me for that, but I would respectfully suggest that a sentence of probation coupled with a period of home detention would be appropriate to remedy the injustice done as a result of Dr. Hunt's conduct.

THE COURT: Home detention; why home detention?

MS. HODDE: Your Honor, I just assume that since the court imposed a sentence, I believe, of pure probation for Ms. Reed, that it's troubling to try to figure out the relative roles of everyone in this. Ms. Reed made more, I think $19,000 as opposed to Dr. Hunt making a $11,000. I don't exactly understand the hierarchy of who's more culpable and whose less culpable.

I know that Ms. Reed did get a role adjustment for recruiting, some sort of a two point, I think, leadership adjustment. Dr. Hunt has received an abuse of trust adjustment.

I just felt that would be a reasonable sentence; certainly one of probation I think would be. But if the court felt the need to impose some measure of incarceration, I would respectfully suggest that home detention would serve that purpose.

THE COURT: Okay. Okay. This is one of the more difficult, complicated sentencings that the court has had to do.

115

We must bear in mind that under the present sentencing situation, the court has to take account of the sentencing guidelines but also in taking account of that impose a sentence that is sufficient but not greater than necessary to comply with the purposes set forth in the statute.

Let me say first of all, that it's the court's view that the government's aggressive vehement pursuit of Dr. Hunt is a bi-product of the fact that Mr. Noble's behavior was so egregious. The scheme was egregious. He was egregious. He is a snake oil salesman, a medicine man.

The Jury saw the videos of Mark Noble's sales pitch, as did the court on more than one occasion. And were it not for Mr. Noble and those videos and his presence in this case, it's the court's view that Dr. Hunt might well have been given some civil out for this behavior, and he might well not have been convicted by a jury, but Mark Noble added great flavor to the case in this jury trial. And that's kind of an overarching impression that the court has about this case.

That is not to excuse Dr. Hunt's behavior. He's given lots of explanations for his behavior, but there's no excuse for the behavior.

There were enough violations of the various rules that apply to doctors when they are billing for their

116

services and authorizing testing that Dr. Hunt transgressed that the court cannot find that he was totally innocent of any knowledge.

I believe the government characterized him as being willfully ignorant at -- in its closing argument, that he buried his head in the sand because he wanted to do this.

But why did he want to do it? And the court has puzzled about that a lot. He described this part of his practice as a very small percentage of his practice, and the government hasn't contended otherwise.

He made very little money from this. I mean, he made $7,500, or something, over the course of two or three years. It can't be the money. He was getting paid $10 a test. It can't have been the money.

He was getting more from BlueCross, but it wasn't the money. I mean, the presentence report shows that he had built up his practice to be making

hundreds of thousands of dollars a year with a very lucrative practice, so it wasn't the money.

And so in trying to figure out his motivation, the court has found helpful his statements today but very helpful the letters, from probably a whole bunch of people that are in the courtroom, and the nature of Dr. Hunt's practice, and the court thinks that Dr. Hunt believed in the test.

117

He is a wholistic preventive medicine person. Unfortunately for him the insurance companies haven't yet gotten there. They are getting there, but it's a slow slog to get them there, to realize, as the court believes, that if they would authorize more preventive medicine reimbursement, they might in fact save money overall. And I think they are getting there, and -- but it's slow.

But the court feels that Dr. Hunt was -- first of all, was hoodwinked by Mr. Noble, second of all was naive, third of all was trusting, fourth of all was unknowledgeable about the business part of the practice like many, many doctors and other healthcare professionals are, but most of all was motivated to do this because he thought it was a good test, and he thought that it would detect some things that would be helpful for people to detect.

It wasn't a harmful test. It didn't do harm. It wasn't invasive. And we did have testimony that it could have led to invasive testing in some instances, although I don't believe we had any testimony that in fact it did.

But the people could have become alarmed and pushed their doctors to do something that would be more invasive. But heaven knows, we have got a doctor whose got to make the independent medical judgment about whether or not to do that invasive test, and the doctor is going to know how valid this test is.

118

So I think there's not a whole lot of legitimate fear that this test in fact could have led to unnecessary invasive tests.

Moreover, the patients wanted the test. They were told that it wouldn't cost them anything, that insurance was going to pay for it. And in fact, they had the test. It wasn't billing for a test that wasn't performed, and the test did have the potential for positive medical information.

Focus -- continuing to focus on the nature and circumstances of the offense, the defendant testified that he thought that a nurse practitioner was

working somehow under his license at these fairs and nursing homes.

He had faxed a list of nurse practitioners to Mark Noble, who had requested it, and there was testimony at trial from some provider, Cigna or BlueCross person, that a nurse practitioner can order a diagnostic test.

Now, the insurance companies split hairs here and they don't call this a diagnostic test.
They call this a screening test, and they don't reimburse for screening tests. But there was testimony that nurse practitioners can order diagnostic tests.

The court continues to be bothered by the fact that the two joint owners of these enterprises with Mr. Noble, who stood to benefit financially from the -- this

enterprise, who ought to have known if they didn't know what Mr. Noble was doing and the legitimacy of what he was doing, Dr. McCoy and Dr. Sabourin, were not prosecuted here.

And it's not my job to figure out who ought to be prosecuted, but it is my job to look at the fairness of things and to look at how much Dr. Hunt should be penalized for what he did when the co-owners of this

enterprise who certainly should have known Mark Noble and his practices and what in the heck he was doing a lot more than Dr. Hunt, suffered no penalty whatsoever in this prosecution.

Likewise, other doctors who were doing what Dr. Hunt did, perhaps not for as long as he did it, but I believe Dr. Bartee got pretrial diversion, didn't he? Didn't he get pretrial diversion?

MS. RAMSAUR: It hasn't been signed, Your Honor.

THE COURT: Nothing happened to Dr. Moore, so Nothing happened to Dr. Adams, so far as the court knows. far as the court knows.

So there is a glean here that there is some -- to -there is something that doesn't make sense about this case to the court in terms of the penalty that the government is seeking against Dr. Hunt when there were so many other people involved who have suffered no penalty whatsoever.

And Dr. Hunt had no interest in the company and made very little money from what he did. Dr. McCoy, himself,

120

testified that he made $35 per test, that he created the questionnaires that were used by Dr. Hunt, who's not a radiologist.

Dr. McCoy testified he didn't know the insurance rules. He also testified that it was not unusual for a doctor to sign an order for a test after a test was done.

James Haynes wasn't prosecuted in this case. He had a law enforcement background, and there were a lot of red flags for him. He wasn't prosecuted. He did all the tests.

Diane Haynes wasn't prosecuted. In fact, the government kind of pussyfooted with Diane Haynes and announced to the court that, well, she hadn't been promised she wouldn't be prosecuted. But in fact, as far as the court knows, at least as of trial she had not been prosecuted and probably still has not been prosecuted.

She allowed herself to be held out as a nurse practitioner when she knew she wasn't a nurse practitioner. She knew that Noble was holding her out as a nurse practitioner.

She knew Pat Reed was telling people that. She knew that she was supposedly working for Dr. Hunt or under his license, and she'd never even met Dr. Hunt.

There's a lot of people involved in this that knew at least as much as Dr. Hunt who have not paid any price for their involvement.

Again, it's not the court's job to figure out who's to be prosecuted, but in figuring out what a fair sentence for Dr. Hunt is, the court must take into account these facts.

The court is also influenced in this sentencing by the fact that the rules for coding and billing are extremely complicated.

Even some supposedly knowledgeable witnesses called by the government at trial couldn't answer questions about billing and coding.

Angela Eddings, a business analyst with BlueCross-BlueShield for 20 years could not answer the question whether nurse practitioners can order tests.

Diane Ward, a certified coder, testified that -- her testimony revealed what an extremely complicated process the coding and billing is that was involved in this case.

She also testified that if a provider and BlueCross don't agree on the coding, then they discuss it; that many of these issues are not black and white. And there was a lot of testimony at trial here on whether or not Dr. Hunt should be billing for -- as a consultant or not, and he and his billing person had lots of conversations about that.

Physicians hire coding services and specialists in this area to do this for them because it's so complicated.

Julie Davis did his billing. She testified that Dr.

122

Hunt asked her advice about coding. Even though she was clear she was not a certified coder, but she testified that Dr. Hunt asked her advice, and she testified that she and Dr. Hunt tried to make these billing decisions in good faith and not to defraud anyone.

And the court has already remarked in terms of the discrepancies, if there are any, between her and Dr. Hunt's testimony. She also was not prosecuted in this case and had not been prosecuted as of the time of her testimony at trial.

Dr. Hunt was not a Medicare provider, and so he was not provided with Medicare's rules; Special Agent Turner testified to that at trial, that he would not have received their rules because he wasn't a Medicare provider, and he didn't bill Medicare.

Mr. Noble -- and I found interesting Dr. Hunt's statements today about starting his practice, being wooed by people from the drug companies and other

providers coming in and showing you how to do things. Noble was one of those people.

He showed Dr. Hunt how other doctors were authorizing the tests, told him that Dr. McCoy had created the questions. Dr. McCoy was a radiologist. Dr. Hunt talked to Dr. McCoy.

There were many things that Dr. Hunt testified gave

him a measure of comfort about what Mark Noble was doing, that militated against his having fraudulent intent.

The jury found he had fraudulent intent, but the court can certainly consider those things in sentencing despite the jury's finding.

Noble told him that he had passed a Medicare audit. Noble told him he had gotten an award from the American Heart Association and had the certificate to prove it.

Dr. Hunt talked to Dr. McCoy, who was a part owner in this enterprise; that gave him a comfort level. He knew that other doctors were authorizing the tests.

Other factors that the court is considering, again under the nature and circumstances, Dr. Hunt testified that he did go to some of these fairs early on.

The government concedes that. Although the government doesn't concede he was screening people for this test at those fairs, but his own testimony was that he was doing that and that he did not order the test for everyone when he spoke to people at these fairs.

He obviously wasn't aware that he was supposed to be a treating physician to order this test or he was blatantly ignoring it when he showed up at these fairs.

He thought a nurse practitioner was ordering these tests somehow under his guidance or under his license, or something.

124

Now, the government made a point -- it hasn't been mentioned today, but it certainly was a point at trial -that Dr. Hunt had other nurse practitioners. There was supposed to be a protocol agreed to between the doctor and nurse practitioner. He didn't have that with whatever nurse practitioner was showing up at Noble's enterprise.

When he was interviewed by the government, he admitted that he was authorizing these tests after they were performed, which has some impact upon whether he had a fraudulent intent, at least in the court's mind.

In terms of the history and characteristics of Dr. Hunt, he comes from a humble background. He worked his way through college. He was the first person in his family to go to college. He became a very successful physician before everything crashed around him.

His patients have a very high opinion of him. Certain physicians who wrote letters on his behalf have a very high opinion of him.

His background would not lead one to believe that he would jeopardize his medical license by knowingly committing a fraud from which he made very little money.

In terms of the needs that the sentence must meet, the sentence must reflect the seriousness of the offense. It must promote respect for the law. It must provide a just punishment. It must protect the public from further crimes,

125

and it must provide the defendant with needed educational or vocational training or medical care. None of that comes in to this particular case.

In terms of the sentence to be imposed, the court is very affected by the fact that Dr. Hunt cannot practice medicine; we don't know for how long, maybe

the rest of his life, certainly for any period of time he's going to be under supervision by this court.

That is a huge, huge punishment that is already being extracted against Dr. Hunt that Mark Noble doesn't have, Pat Reed doesn't have, certainly none of these other doctors involved here who didn't get prosecuted don't have. That is a huge price that Dr. Hunt is already paying for what he did.

And that is very -- an important consideration for this court in terms of what kind of a sentence needs to be levied to have an impact in terms of a just punishment, in terms of promoting respect for the law, and so forth.

Losing his license alone promotes all of that without any further punishment whatsoever.

The court under the present system takes into account the sentencing guideline. The sentencing guideline in this case in the context of all the factors that I have said is not an appropriate sentence for Dr. Hunt.

And the court believes strongly in the right to go to

126

trial, the right to try to convince a Jury that you did not have a fraudulent intent. You didn't succeed. But

in this judge's view, you are not to be penalized for that. That is your right.

And again, the court feels strongly that if it were not for the nature of Mr. Noble and his enterprise, if this were some much more low key scheme -- I think that
Mr. Noble's brazen scheme infected the trial of this case with the jury.

At any rate, my sentence for Dr. Hunt is going to be five years of probation.

The special conditions of his probation are as set out, and that is on each count to run concurrent with each other.

The restitution to be paid is $151,161.78 jointly and severally with the other defendants in this case. He must pay the $1,200 special assessment.

I'm going to order a $6,000 fine in addition to the restitution. The restitution is to be paid in the amount of 10 percent of his gross monthly income.

Let me ask the probation office, you are recommending something I haven't seen before, is that based on his financial resources?

PROBATION OFFICER: Yes, Your Honor.

THE COURT: You want a $50,000 lump sum

payment –

PROBATION OFFICER: Yes, Your Honor.

THE COURT: -- within 60 days?

PROBATION OFFICER: Yes, Your Honor.

THE COURT: Do you have any argument that ought not to be ordered?

MS. HODDE: Your Honor, the only problem with the suggested lump sum payment is that would be a third of the joint and several restitution. And, obviously, Mr. Noble is incarcerated and is not contributing at this point probably at all to the restitution contribution.

And it would put Dr. Hunt in a position of probably paying the majority of the restitution.

In addition, the only other consideration I'll give the court is that obviously Dr. Hunt and his wife are in the position of Dr. Hunt really not being able to practice medicine, and his wife trying to support the family.

And the resources they have in the bank are basically going to be what they are living off until Dr. Hunt figures out what he's going to do for a living.

And it puts the it puts a little bit of financial pressure on the Hunts.

I recognize their net worth is significant, but I would urge the court to give them an opportunity to pay a lesser amount than that on the front end.

I would also ask the court not impose as a condition

128

the cost of supervision.

THE COURT: Well, looking over the -- he's going to figure out something to do. And looking over the assets that are set out in the presentence report, I'm going to take that -- I'm going to take that recommendation. I am going to order $50,000 within 60 days of sentencing.

But I'm not going to order that the remaining restitution be paid within 60 days of being placed on supervision.

I'm going to order the restitution be paid at 10 percent of the gross monthly income on a monthly basis. No interest shall accrue as long as he remains in compliance with the payment schedule.

I'm going to order the payment of the $6,000 fine within 60 days. What are the costs of supervision for probation?

PROBATION OFFICER: Your Honor, it's listed in paragraph the 90 of the presentence report.

THE COURT: Ninety?

PROBATION OFFICER: It's 280.

THE COURT: I never have anybody who can pay this, so I have no idea what it is. Community confinement would be the halfway house?

PROBATION OFFICER: Yes, Your Honor.

THE COURT: So supervision is 287.73 a month?

129

PROBATION OFFICER: Yes, Your Honor.

THE COURT: All right. I'm going to order that he pay that cost of supervision per month.

He's to furnish all financial records including without limitation earnings records and tax returns to the probation office upon request.

He's not to incur new debt or open additional lines of credit without the prior approval of the probation office unless he's in compliance with all of the payment schedules.

He's prohibited from owning, carrying or possessing firearms, destructive devices or other

dangerous weapons. He's to cooperate in the collection of DNA.

Let me add additional -- I want to add a few additional reasons for my sentence in this case. The court has read -- I don't know how many letters were attached to the sentencing position of the defendant, but many, many, many, letters.

And it's clear to the court that Dr. Hunt is someone important to his patients, and he has a valuable medical practice and something valuable to add to the community of medical care that's offered out there. He's offering some alternative kinds of treatments which in many instances people were at their last resort or they were facing some kind of serious surgery and they were able to get treatment from Dr. Hunt that made them better and avoided surgery and

130

perhaps avoided dying prematurely.

And that also is a factor in the court's sentence. To the extent that this sentence will perhaps assist in returning him to the practice of medicine at some point, the court feels there's value to that.

I don't know that it will make any difference. You have 12 felony convictions, and so the

probationary sentence may not make any difference whatsoever to the licensing facilities -- licensing agencies. But to the extent it might, the court feels that that's a valid consideration.

To the extent -- you may appeal your sentence, Dr. Hunt, within ten days. You may apply to appeal under the pauper's oath if that's appropriate, which it wouldn't be. The clerk's office will file your notice of appeal if you request the clerk's office to do so.

Are there any other matters?

MS. HODDE: Your Honor, just one thing I wanted to advise the court, I have already advised probation, I had suggested to Dr. Hunt and his wife that they pay the $1,200 special assessment prior to the sentencing because in my experience, that issue tends to be an issue with BOP in the event the court had ordered a sentence of incarceration, so I had hoped just to make sure that was on the record that he has paid this, and I will provide that receipt to probation as well.

131

THE COURT: Okay. Anything else, Ms. Ramsaur. Anything else?

MS. RAMSAUR: Just note the government's objection to the sentence, Your Honor.

THE COURT: Okay, very good. You want to be specific? You don't have to be.

MS. RAMSAUR: If the court wants me to, I'll go on for a while about my objections.

THE COURT: I think I would rather have lunch. It's 1:30, and none of us have had lunch, so I'm sure that I will see that at some point. Okay. We are in recess.

Dr. Hunt - -

MS. HODDE: Thank you, Your Honor.

THE COURT: -- I hope that you do not interpret my sentence as indicating that I don't think what you did was a serious thing. It was a serious thing, and I think that you ought to -- if you were not fully aware that there were serious problems with it, you should probably have been aware. But for all the reasons that I have given, I feel it's a just sentence, and I wish you good luck.

DR. HUNT: Thank you.

MS. HODDE: Thank you, Your Honor.

MR. BRAUN: Thank you.

THE COURT: We're in recess.

No. 08-687

In the Supreme Court of the United States

RUSSELL WAYNE HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly vacated petitioner's sentence and remanded for resentencing because the sentencing court had relied in part on a factual finding that was contrary to the jury's verdict.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 11

TABLE OF AUTHORITIES

Cases:

American Constr. Co. v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372 (1893) 6
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 6
Gall v. *United States*, 128 S. Ct. 586 (2007) 5, 7, 10
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 6
Kimbrough v. *United States*, 128 S. Ct. 558 (2007) 5, 9
Spears v. *United States*, 129 S. Ct. 840 (2009) 9
United States v. *Curry*, 461 F.3d 452 (4th Cir. 2006) 10
United States v. *Hourihan*, 66 F.3d 458 (2d Cir. 1995), cert. denied, 516 U.S. 1135 (1996) 10
United States v. *Rivera*, 411 F.3d 864 (7th Cir.), cert. denied, 546 U.S. 966 (2005) 10
United States v. *Tapia-Romero*, 523 F.3d 1125 (9th Cir. 2008) 8
United States v. *Weston*, 960 F.2d 212 (1st Cir. 1992) 10
VMI v. *United States*, 508 U.S. 946 (1993) 6
Wisniewski v. *United States*, 353 U.S. 901 (1957) 8

Statutes and rule: Page

18 U.S.C. 371 1
18 U.S.C. 1035 2
18 U.S.C. 1347 2
18 U.S.C. 3553(a) 3, 5, 7, 8, 9
18 U.S.C. 3553(a)(1) 8
Sup. Ct. R. 10 8

In the Supreme Court of the United States

No. 08-687

RUSSELL WAYNE HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B48) is reported at 521 F.3d 636.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2008 (Pet. App. C1). A petition for rehearing was denied on August 22, 2008 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of conspiracy to commit health care fraud, in violation of 18 U.S.C. 371; six counts of health care

fraud, in violation of 18 U.S.C. 1347; and five counts of making false statements relating to health care matters, in violation of 18 U.S.C. 1035. He was sentenced to five years of probation and was ordered to pay a $6000 fine and $151,161.78 in restitution. Pet. App. B2. The court of appeals affirmed petitioner's convictions, but vacated his sentence and remanded for resentencing. *Id.* at B1-B48.

1. Petitioner, a licensed physician, was hired by Mark Noble to review medical history questionnaires filled out by patients and to sign orders for the patients to undergo carotid artery ultrasound tests performed by Noble's diagnostic testing companies. Medicare and private insurers compensated the companies only for diagnostic tests that had been determined to be medically necessary by a treating physician, or by a nurse practitioner or physician's assistant working under the license of a treating physician. Noble brought petitioner medical history questionnaires and orders after the tests had already been performed, and petitioner signed the orders without having seen or examined the patients. Petitioner collected a $10 fee from Noble for each signature, and he submitted insurance claims for his "consultations" with patients, using a billing code that required a face-to-face examination of the patient. Pet. App. B3-B6; Gov't C.A. Br. 4-11.

After federal agents began to investigate Noble and his companies, petitioner falsely told the agents that he had not been paid $10 per signed order, and that all of the tests had been ordered before they were performed. Petitioner also claimed that a nurse practitioner working under his license had examined the patients, although he admitted that he had never met the nurse

practitioner, did not know that person's name, and had not confirmed his or her credentials. Pet. App. B6.

2. A federal grand jury in the Middle District of Tennessee returned an indictment charging petitioner with conspiracy to commit health care fraud, health care fraud, and making false statements relating to health care matters. After a jury trial, petitioner was convicted on all counts. Pet. App. B6-B8.

At sentencing, the district court determined that petitioner's total offense level was 18, which reflected a base offense level of six, increased by ten levels for the amount of loss, and increased by an additional two levels because petitioner had abused his position of trust as a Blue Cross provider. 9/1/06 Sent. Tr. 75-77; see Presentence Report ¶¶ 49-50, 52. That offense level, with petitioner's criminal history category of I, resulted in an advisory Sentencing Guidelines range of 27 to 33 months of imprisonment. 9/1/06 Sent. Tr. 78.

Petitioner's counsel urged the court to impose a below-Guidelines sentence, arguing that the tests petitioner had ordered "did serve some benefit" and that petitioner was a "dedicated physician" who had been taken advantage of by Noble. 9/1/06 Sent. Tr. 83-90. During his allocution, petitioner stated that he had "trusted" Noble and had "believed that what I was doing was okay." *Id.* at 99-100. The government asked the court to sentence petitioner within the Guidelines range. The government noted that petitioner had signed more than 400 orders for patients to undergo tests even though petitioner "never saw one of those people," and that the jury had rejected petitioner's claim that he lacked fraudulent intent. *Id.* at 104-113.

After considering the pertinent factors under 18 U.S.C. 3553(a), the district court concluded that a Guide-

lines sentence was "not an appropriate sentence" and sentenced petitioner to five years of probation. 9/1/06 Sent. Tr. 125-126. The court found that petitioner had been motivated to participate in Noble's scheme because petitioner "believed in the test" and thought that it would be helpful to patients, and that petitioner, who was "naive" and "trusting," had been "hoodwinked" by Noble. *Id.* at 116-117. The court also relied on petitioner's trial testimony that his conversations with Noble and other doctors "gave him a measure of comfort about what Mark Noble was doing." *Id.* at 122-123. The court stated that petitioner's possible reliance on those conversations "militated against his having fraudulent intent." *Id.* at 123.

Acknowledging that "[t]he jury found [petitioner] had fraudulent intent," the district court concluded that it could "consider those things in sentencing despite the jury's finding." 9/1/06 Sent. Tr. 123. The court also noted that other physicians who had participated in the scheme had not been prosecuted, that petitioner had worked his way up from a "humble background" to become a successful physician, and that petitioner's loss of his medical license while he was under court supervision was "already * * * a huge price * * * for what he did." *Id.* at 118-125. The district court further observed that petitioner's medical practice was "important to his patients" and "valuable * * * to the community," and the court expressed hope that a probationary sentence would "assist in returning him to the practice of medicine at some point." *Id.* at 129-130.

3. Petitioner appealed his convictions, and the government cross-appealed his sentence. The court of appeals affirmed petitioner's convictions, but vacated his sentence and remanded for resentencing. Pet. App. B1-

B48. The court held that the sentence was "substantively unreasonable" because the district court had "relied in part on the defendant's not having had an intent to defraud in this case." *Id.* at B31-B33. The court explained that "[n]othing in § 3553(a) suggests that Congress intended that sentencing judges should rely on a defendant's innocence when the defendant has already been found guilty beyond a reasonable doubt." *Id.* at B32-B33. Although "the district court also relied on a number of factors that were either proper or arguably proper," the court concluded, its reliance on an "impermissible factor[]" that was not encompassed within Section 3553(a) required a remand for resentencing. *Id.* at B32-B33, B35-B36.

Judge Martin dissented in part, arguing that the majority had "mischaracteriz[ed] * * * the district court's reasoning." Pet. App. B37-B38 (concurring in part and dissenting in part). Based on the district court's statements at sentencing, Judge Martin concluded that the court had not relied on petitioner's "innocence" but had "merely found [petitioner] less culpable than other defendants and sentenced him accordingly." *Id.* at B37-B42. In Judge Martin's view, this Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), required that petitioner's sentence be affirmed. Pet. App. B43-B46.

ARGUMENT

Petitioner contends (Pet. 18-29) that the standard applied by the court of appeals in reviewing his sentence for unreasonableness is inconsistent with this Court's decisions in *Gall* v. *United States*, 128 S. Ct. 586 (2007), and *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007).

Petitioner is mistaken, and further review is unwarranted.

1. The court of appeals vacated petitioner's sentence and remanded the case to the district court for resentencing. Pet. App. B3, B36. Its decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for the denial of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

The interlocutory character of the court of appeals' decision provides a particularly sound reason for denying review under the circumstances of this case. The decision was based on the sentencing court's reliance on a factual finding that petitioner lacked fraudulent intent. See Pet. App. B32-B35. As the court of appeals noted (*id.* at B35), however, the district court also based the downward variance "on a number of factors that were either proper or arguably proper." The Sixth Circuit also observed that, under *Gall*, the court of appeals "accord[s] great deference to district court sentencing determinations," and it stated that the disparity between petitioner's sentence of probation and the Guidelines advisory range of 27 to 33 months of imprisonment "is not enough to conclude that the sentence is unreasonable." *Ibid.*

At present, petitioner's resentencing has been stayed pending resolution of his certiorari petition. 9/8/08 Dist. Ct. Order. It is quite possible that petitioner will receive the same sentence on remand even if the court of

appeals' decision stands. That occurrence would render moot any issue as to the reasonableness of petitioner's original sentence.

2. In any event, the court of appeals correctly applied the abuse-of-discretion standard for appellate review of sentencing decisions, see *Gall*, 128 S. Ct. at 594, when it concluded that the district court's determination that petitioner lacked fraudulent intent was an "impermissible" sentencing consideration. As the Court explained in *Gall*, a court of appeals reviews a sentence under a two-step procedure. The court of appeals "must first ensure that the district court committed no significant procedural error." *Id.* at 597. Second, "[a]ssuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Ibid.* In reviewing petitioner's sentence for unreasonableness, the court of appeals explicitly stated that it was applying "the limited abuse-of-discretion review prescribed by *Gall*." Pet. App. B31; see *id.* at B35 (noting that *Gall* "directs us to accord great deference to district court sentencing determinations under the abuse of discretion standard").

Contrary to petitioner's assertion (Pet. 22), the court of appeals did not improperly "label as categorically 'impermissible'" a factor that was "within the district court's charge under § 3553(a)." Rather, the court held that Section 3553(a) does not authorize a district court to rely on a determination that the defendant is not guilty of the charge on which he was convicted. Pet. App. B32-B33. This Court has never suggested that sentencing courts have unlimited authority to consider factors that are not specifically enumerated in Section 3553(a). See *Gall*, 128 S. Ct. at 596 & n.6 ("Section 3553(a) lists

seven factors that a sentencing court must consider."); see also, *e.g.*, *United States* v. *Tapia-Romero*, 523 F.3d 1125, 1127-1128 (9th Cir. 2008) (cost of imprisonment is not a valid factor under Section 3553(a)). And while a sentencing court may properly conclude, based on the "nature and circumstances of the offense," 18 U.S.C. 3553(a)(1), that a particular defendant is less culpable than others convicted of similar crimes, nothing in Section 3553(a) authorizes the court to take into account its own disagreement with the jury's verdict about whether the defendant is guilty of the offense at all.[1]

As the court of appeals explained (Pet. App. B33-B35), the district court's statements at sentencing suggest that the court concluded that, "despite the jury's finding," evidence at trial "militated against [petitioner's] having fraudulent intent." 9/1/06 Sent. Tr. 122-124.[2] The district court's conclusion that petitioner lacked fraudulent intent—which would have absolved petitioner of guilt of the fraud offenses—is not a factor encompassed by Section 3553(a), and the court's reliance on that consideration therefore rendered its sentence

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[1] There is no merit to petitioner's suggestion (Pet. 22-26) that the court of appeals' decision in this case is inconsistent with other Sixth Circuit decisions that have "discussed substantive review without referring to 'impermissible factors.'" None of the cases on which petitioner relies involved a sentencing court's reliance on a finding that contradicted the jury's verdict. Moreover, even if the ruling below conflicted with other Sixth Circuit decisions, an intracircuit conflict ordinarily is not an appropriate basis for review in this Court. See Sup. Ct. R. 10; *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[2] Petitioner asserts (Pet. 29), as the dissenting judge argued (Pet. App. B37), that the district court "did not, in fact, rely" on petitioner's "innocence." To the extent that petitioner is challenging the court of appeals' interpretation of the district court's reasoning, that record-bound contention does not warrant further review.

unreasonable. See Pet. App. B33, B35 (court of appeals "would not hesitate to reverse a sentence if a judge relied on numerous relevant facts but also relied, for instance, on the morning's horoscope").

Contrary to petitioner's contention (Pet. 21-22), the court of appeals' conclusion that the district court relied on an impermissible factor does not conflict with this Court's decision in *Kimbrough*. In *Kimbrough*, the Court held that "it would not be an abuse of discretion for a district court to conclude" that the disparity between the Sentencing Guidelines' treatment of crack and powder cocaine offenses "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." 128 S. Ct. at 575. Nothing in *Kimbrough* suggests that a sentencing court may take into consideration factors that are not embraced by Section 3553(a). Petitioner correctly points out (Pet. 21) that, under *Kimbrough*, district courts may vary from the advisory Guidelines ranges "even as a matter of policy." See *Kimbrough*, 128 S. Ct. at 570; *Spears* v. *United States*, 129 S. Ct. 840, 843 (2009) ("[T]he point of *Kimbrough* * * * [was] a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them."). In this case, however, the district court gave no indication that its sentencing decision was based on a policy disagreement with the Guidelines. The decision in *Kimbrough* is therefore inapposite here.

The court of appeals also correctly held (Pet. App. B32) that the district court's finding that petitioner lacked fraudulent intent was contrary to the jury's verdict and therefore "clearly erroneous." As the court of appeals explained, "a factual determination is necessarily clearly erroneous where a jury has previously found

to the contrary beyond a reasonable doubt." *Ibid.*; see *United States* v. *Curry*, 461 F.3d 452, 460-461 (4th Cir. 2006) (district court erred in sentencing defendant "based on a conclusion that contravened the jury's verdict"); *United States* v. *Rivera*, 411 F.3d 864, 866 (7th Cir.) (finding it "unnecessary and inappropriate" for the sentencing judge to "reexamine, and resolve in the defendant's favor, a factual issue that the jury has resolved in the prosecutor's favor beyond a reasonable doubt"), cert. denied, 546 U.S. 966 (2005); *United States* v. *Hourihan*, 66 F.3d 458, 465 (2d Cir. 1995) ("[A] guilty verdict, not set aside, binds the sentencing court to accept the facts necessarily implicit in the verdict.") (quoting *United States* v. *Weston*, 960 F.2d 212, 218 (1st Cir. 1992)), cert. denied, 516 U.S. 1135 (1996). In finding petitioner guilty of health care fraud, the jury necessarily determined beyond a reasonable doubt that petitioner had "acted with intent to defraud," Jury Instructions 37-38 (Dec. 15, 2005); see Pet. App. B21-B25 (summarizing evidence of petitioner's fraudulent intent), and the sentencing court was bound by that finding.

Petitioner acknowledges (Pet. 27-28) that "a sentence based on clearly erroneous facts is subject to reversal." He notes, however (Pet. 28), that while the court of appeals concluded (Pet. App. B31) that his sentence was "substantively unreasonable," this Court has cited a district court's "selecting a sentence based on clearly erroneous facts" as an example of "procedural error." *Gall*, 128 S. Ct. at 597. Petitioner's contention that the court of appeals mistakenly labeled the district court's error as "substantive," rather than "procedural," does not raise a question of broad significance that would warrant resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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